No. 96-6133-CFH Title: William Bracy, Petitioner
v.
CAPITAL CASE Richard B. Gramley, Warden

Docketed: Court: United States Court of Appeals for
September 27, 1996 the Seventh Circuit

Entry	Date	Proceedings and Orders
	Sep 24 1996	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 1, 1996)
	Oct 29 1996	Order extending time to file response to petition until November 1, 1996.
	Nov 8 1996	Brief of respondent Richard B. Gramley, Warden in opposition filed.
	Nov 21 1996	DISTRIBUTED. December 6, 1996
	Dec 9 1996	REDISTRIBUTED. December 13, 1996
	Dec 30 1996	REDISTRIBUTED. January 3, 1997
	Jan 6 1997	REDISTRIBUTED. January 10, 1997
	Jan 10 1997	Petition GRANTED. Limited to the following question: Whether a habeas petitioner who was convicted of a capital offense and sentenced to death in a trial before a judge who admittedly accepted bribes in other contemporaneous criminal cases is entitled to discovery to support his claim that he was denied the right to a trial before an impartial judge. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 21, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 21, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 7, 1997. Rule 29.2 does not apply. SET FOR ARGUMENT April 14, 1997. **********
	Jan 24 1997	Motion of petitioner for appointment of counsel filed.
	Jan 29 1997	DISTRIBUTED. February 14, 1997 (Page 41)
	Feb 11 1997	Joint appendix filed.
	Feb 18 1997	Motion for appointment of counsel GRANTED and it is ordered that Gilbert H. Levy, Esquire, of Seattle, Washington is appointed to serve as counsel for the petitioner in this case.
	Feb 18 1997	Record filed.
	Feb 19 1997	Brief of petitioner William Bracy filed.
	Feb 21 1997	Brief amicus curiae of Concerned Illinois Lawyers and Law Professors filed.
	Feb 28 1997	CIRCULATED.
	Mar 21 1997	Brief of respondent Richard B. Gramley, Warden filed.
	Mar 21 1997	Brief amici curiae of California, et al. filed.
	Mar 31 1997	Record filed.
	Apr 7 1997	Reply brief of petitioner William Bracy filed.
	Apr 14 1997	ARGUED.

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ORIGINAL

NO. 96-6133

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1996

WILLIAM BRACY,

Petitioner,

vs.

CAPITAL CASE

RICHARD GRAMLEY, WARDEN,
PONTIAC CORRECTIONAL CENTER,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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CAPITAL CASE

QUESTIONS PRESENTED

1. The first question presented is whether there was a structural defect in the Petitioner's trial, giving rise to a presumption of prejudice, when the judge who presided was a racketeer involved in a pattern of taking bribes to fix criminal cases, including homicides.

2. The second question presented is whether a habeas corpus petitioner's right to an evidentiary hearing is subject to a higher standard when his constitutional claim is based on newly discovered evidence obtained too late to be presented to the state courts.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

WILLIAM BRACY, Petitioner,

v.

RICHARD GRAMLEY, Warden,
Pontiac Correctional Center, Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner William Bracy, respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming the dismissal of the petition for a writ of habeas corpus.

I.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as Bracy v. Gramley, 81 F.3d 684 (7th Cir. 1996). The opinion of the District Court is reported as United States ex rel. Collins v. Wellborn, 868 F. Supp. 950 (N.D. Ill. 1994). The opinion of the Illinois Supreme Court affirming the denial of the petition for post conviction relief is reported as People v. Collins, 606 N.E.2d 1137 (Ill. 1992). The opinion of the Illinois Supreme Court on direct appeal

affirming the conviction is reported as People v. Collins, 478 N.E.2d 267 (Ill. 1985).

II.

JURISDICTION

The decision of the Court of Appeals for the Seventh Circuit was entered on April 12, 1996. The Petition for Rehearing and Suggestion for Rehearing en banc was denied on June 26, 1996. This petition is timely filed within ninety days of that date. This Court's certiorari jurisdiction is invoked pursuant to Title 28 United States Code § 1254(1).

III.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides in part:

> . . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor to deny any person within its jurisdiction the equal protection of the laws.

IV.

STATEMENT OF FACTS

A. Facts Relevant to Conviction and Sentence

The Petitioner, his co-defendant, Roger Collins, and another individual, Murray Hooper, were indicted for armed robbery and murder of Frederick Lacy, R.C. Pettigrew, and Richard Holliman. Hooper was tried separately. The State presented evidence that on November 12, 1980, Lacy, Pettigrew and Holliman were taken from an apartment at 2240 South State Street in Chicago, driven to a viaduct at Roosevelt Road and Clark Street, and shot to death. All

three were bound with rope and killed by shotgun blasts and gun shots.

The principal witness against Petitioner and Collins was an individual named Morris Nellum, who pleaded guilty to a reduced charge and was sentenced to a term of probation. Nellum testified that he went to the apartment at 2240 South State Street and observed Collins, Petitioner and Hooper in the company of three other individuals. These individuals were subsequently taken from the apartment and placed in a red Oldsmobile. Collins asked Nellum to follow them in a brown Cadillac. When Nellum arrived at the viaduct at Roosevelt and Clark, he heard shotgun blasts. He then saw Petitioner and Hooper get into Petitioner's car and Collins got into the Cadillac with Nellum and they all drove off. Petitioner was carrying a sawed-off shotgun. Later, Nellum accompanied Collins, who threw the two handguns into Lake Michigan.

Witnesses identified Collins and Bracy at the apartment building on South State Street in the company of other individuals, one of whom appeared to be bound. Another witness, Christina Nowell, testified that Bracy took a 38 caliber Charter Arms revolver from her and he later told her that he murdered some people and threw her hand gun in the Chicago River. A Charter Arms revolver and a 357 Ruger handgun were recovered from Lake Michigan by police divers, after they were led there by Nellum in July, 1981. The guns were too rusty to allow for an exact ballistics comparison. However, the serial number on the Charter Arms revolver was the same as the one that was registered to Nowell. Two pieces of rope

were found in the apartment at 2240 South State Street and they had the same characteristics as the rope which was used to bind the victims.

Both Petitioner and Collins presented alibi defenses. Petitioner called his sister, Barbara Harris, who testified that he had dinner with her and her husband on the evening of November 12, 1980. Collins called his girlfriend, Beatrice Mack, who testified that she and Mr. Collins spent the evening and afternoon together on November 12. Both Petitioner and Collins testified on their own behalf and other witnesses were called by the defense to discredit Morris Nellum and Christina Nowell.

The jury elected to disbelieve the defense witnesses and to believe Morris Nellum and returned guilty verdicts on all counts. In a separate sentencing proceeding, the Petitioner and Mr. Collins were sentenced to death.

B. <u>Facts Relevant to Judicial Bias Claim</u>

Thomas J. Maloney presided over the Petitioner's trial and sentenced him to death. The trial occurred in July, 1981. In the course of the trial, Judge Maloney made various discretionary rulings adverse to the Petitioner and his co defendant, including denial of a motion to suppress based upon an alleged illegal search, excusing the only African American prospective juror for cause over the Petitioner's objection, denial of a motion for mistrial based upon testimony that a witness for the State had been placed in protective custody, denial of a request for severance, refusal to give the Petitioner's proposed jury instructions,

refusal to grant a short continuance prior to the commencement of the penalty phase after Petitioner's counsel announced that he was unprepared, permitting the State to introduce evidence of an unadjudicated double homicide in Arizona as non statutory aggravation evidence in the penalty phase, and permitting the Assistant State's Attorney to make arguments in the penalty phase which the Seventh Circuit characterized as improper but not prejudicial.

In support of his petition for habeas corpus, the Petitioner presented evidence that Thomas Maloney was a felony trial judge in the Cook County Circuit Court starting in 1976.[1] Prior to his ascension to the bench, Maloney was a criminal defense attorney who represented various organized crime figures in Chicago. In the course of his career as a defense lawyer, Maloney paid cash bribes to Cook County Judges in cases that he handled. In one instance, Maloney helped secure the acquittal of La Cosa Nostra hit man Harry Aleman on a homicide charge, by bribing the trial judge, Frank Wilson. Maloney himself was closely tied to La Cosa Nostra, and major organized crime figures looked forward to Judge Maloney's appointment as an opportunity to have a "good friend" on the bench.

Upon donning the black robe, Judge Maloney did not disappoint his associates. As a result of his activities on the bench, he was convicted of conspiracy, racketeering, extortion, and obstruction

[1] The evidence included the indictment in United States of America v. Thomas J. Maloney and Robert McGee, United States District Court for the Norther District of Illinois Cause Number 91-CR-477-1, and the Government's written proffer of aggravation evidence submitted in support of its position at former Judge Maloney's sentencing.

of justice. United States v. Maloney, 71 F.3d 645 (7th Cir. 1995). The predicate crimes that formed the basis of the RICO allegation included several instances in which Judge Maloney accepted bribes in return for not guilty verdicts or conviction on reduced charges. Three of these cases were homicide cases. The period of time covered by the conspiracy was the 1980 through 1990. In August, 1981, one month after the Petitioner's trial, Judge Maloney accepted a bribe to acquit organized crime defendants who were charged with homicide. The name of the case was People of the State of Illinois v. Lenny Chow et al., Cook County Circuit Court Cause number 80 C 4020. In two other instances, Maloney initially accepted money to fix murder trials, but then gave the money back in an effort to avoid suspicion, and proceeded to convict the defendants and sentence them to death[2] Maloney also attempted to persuade witnesses to refuse to cooperate with the investigation, and he tried to conceal the bribe money from the Internal Revenue Service.

There was also evidence that Judge Maloney was deliberately tough on defendants who did not bribe him. In her dissenting opinion in the Court of Appeals decision in this case, Judge Rovner made reference to the experience of William Swano, an attorney who bribed Maloney on other occasions, but who decided in one particular case that he would not offer a bribe because the evidence

[2] In one of these cases, People v. Earl Hawkins and Nathan Fields, Cook County Circuit Court Cause Numbers 85-C-6555 and 85-C-7691, the Cook County Circuit recently granted a new trial to the defendants. A copy of the opinion in that case is contained in the appendix to this brief.

favoring his client was strong.[3] 81 F.3d 697. Contrary to expectations, Judge Maloney convicted Swano's client in this case, and Swano learned from the experience that, ". . . to practice in front of Judge Maloney . . . we had to pay." Id.

Petitioner requested that the District Court provide investigative resources and an opportunity for discovery to ascertain whether or not Judge Maloney's involvement with bribe taking had an impact on his decision making in those cases in which he did not receive bribes. The request for discovery was denied. The Seventh Circuit upheld the decision of the District Court dismissing the petition, holding that Petitioner was not prejudiced by Judge Maloney's pattern of misconduct. Chief Judge Posner, writing for the majority, concluded that Petitioner had demonstrated nothing more than an appearance of impropriety and held that discovery would be futile, since Petitioner could not hope to demonstrate Maloney was influenced in this particular case. 81 F.3d 690, 691. Petitioner's request for rehearing en banc was denied, although three judges voted to grant the request.

C. Facts Relevant to Newly Discovered Evidence Claim

In June of 1992, a private investigator working with Petitioner's present counsel, was able to locate Morris Nellum in Chicago, and he provided her with a tape-recorded statement over the telephone. While this statement related primarily to separate murder charges of which Petitioner had been convicted in Arizona,

[3] This information was derived from the transcript of Judge Maloney's trial.

Nellum also provided information concerning his testimony at Petitioner's trial in Illinois. Nellum informed the investigator that contrary to his trial testimony, he was threatened by Chicago police officers with a sledge hammer and hit in the jaw by Detective O'Callaghan when he was arrested and gave his initial statement implicating Petitioner in the triple murder. He also denied seeing Roger Collins or the Petitioner lead the victims to their car in the parking lot at 2240 South State Street and he denied hearing any shots when he arrived at the overpass of Roosevelt and Clark Streets. Nellum also stated that his testimony in the Arizona case was totally false and that he had been coerced into giving false testimony by Cook County Assistant State's Attorney Greg Owen and Chicago Police Detective Hoke.

In July of 1992, Nellum provided a sworn court-reported statement to Petitioner's present counsel in Phoenix, Arizona. In this statement, Nellum repeated his claim that he was beaten by Detective O'Callaghan at the time of this arrest in Chicago, and stated that he also saw Petitioner being beaten by the Police in an adjoining interrogation room. The officers questioning Nellum implied that if he didn't cooperate he would get the same treatment as Petitioner. Nellum stated that he lied at Petitioner's trial when he testified that he saw Petitioner with a shotgun, that he lied in court when he testified that he saw Murray Hooper at Roosevelt and Clark, and that he was required to give false testimony as part of the deal to avoid his being charged with the murders. Assistant State's Attorney Greg Owen, one of the prosecutors at

Petitioner's trial, was the one that told Nellum to give false testimony about Hooper.

In April of 1993, Nellum appeared for a deposition in Phoenix in connection with Post-conviction proceedings in the Arizona homicide case. Shortly before the deposition, Nellum was taken into custody by Chicago police officers who questioned him about his recantation. At the deposition Nellum answered some of defense counsel's preliminary questions, and repeated his claim that he was punched in the face and threatened with a sledge hammer at the time of his original arrest. However, when the Arizona prosecutor and the Cook County Assistant State's Attorney who were present both reminded Nellum that he had stated he only wanted to talk in front of a judge, Nellum refused to answer any further questions, and the Arizona court that had ordered the deposition declined to compel him to cooperate.

The Petitioner requested leave to take Nellum's deposition in connection with his habeas corpus petition in Illinois. The District Court denied this request for a deposition and also declined to grant an evidentiary hearing on Petitioner's claim that his conviction was obtained through the State's knowing use of perjured testimony by Nellum. In affirming, the Court of Appeals held that Petitioner was not entitled to an evidentiary hearing because his claim was based on newly discovered evidence presented many years after his conviction became final and he failed to make the requisite showing that there was good reason to expect that a hearing would result in an order for a new trial. Id. 81 F.3d. 694.

V.

REASONS FOR GRANTING THE WRIT

A. The Court Should Grant the Writ on the Issue of Judicial Bias Because the Seventh Circuit Ignored Established Precedent in Declining to Grant Relief on this Claim

In Tumey v. Ohio, 273 U.S. 510, 523, 71 L. Ed. 749, 47 S. Ct. 437 (1927), this Court held that it violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case. The Court noted that the common law rule was that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in resolving of the subject matter which he was to decide, rendered the decision voidable. Id. at 524. This Court stated, "There was at the common law the greatest sensitivity over the existence of any pecuniary interest, however small or infinitesimal, in the justices of the peace." Id. at 525. Writing for the Court in Tumey, Chief Justice Taft noted that with only slight modification, the common law rule was embodied in the due process clause of the Fourteenth Amendment. Thus, he stated:

> From this review we conclude, that a system by which an inferior judge is paid for his service only when he convicts the defendant has not become so embedded by custom in the general practice either at common law or in this country that it can be regarded as due process of law, unless the costs usually imposed are so small that they may be properly ignored as within the maxim de minimis non curat lex.

Id. at 531

The Court went on to conclude:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Id. at 532, (emphasis supplied).

The Court concluded in Tumey that the right to disqualify a judge, based upon pecuniary interest, existed regardless of the strength of the evidence against the accused. Id. at 535.

Following the decision in Tumey, this Court in In Re Murchison, 349 U.S. 133, 99 L. Ed 942, 75 S. Ct. 623 (1955), recognized that due process guarantees did not simply protect against actual bias, but that ". . . a possible temptation to the average man as judge . . .", would suffice. The Court stated:

> Such a stringent rule may sometimes bar trial by judges who have no actual bias and who do their very best to weigh the scales of justice equally between the contending parties. But to satisfy its high function in the best way "justice must satisfy the appearance of justice." Offut v. United States, 348 U.S. 11, 14.

Id. at 136, (emphasis supplied).

The strict rule of Tumey and Murchison was applied in Aetna Life Insurance Company v. Lavoie, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1985). There an Alabama Supreme Court judge was held to be disqualified to decide a case pending before him on appeal, where he was also a plaintiff in another case involving similar issues of law. This Court noted that it was not required to decide whether the Judge had actually been influenced since it was sufficient to determine that there was a "possible temptation".

Id. at 825. In reversing the State Court judgment, this Court stated:

> Because of Justice Embry's leading role in the decision under review, we conclude that the "appearance of justice" will best be served by vacating the decision and remanding for further proceedings.

Id. at 828, (emphasis supplied).

In Vasquez v. Hillary, 474 U.S. 254, 263, 88 L. Ed. 2d 598, 106 S.Ct. 617 (1986), this Court noted that when the judge has a possible interest in the proceeding, there arises a presumption of prejudice. The Court stated:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired.

Id. at 263, (emphasis supplied).[4]

Several principals emerge from this line of cases. First, the strict common law rule requiring disqualification for the "slightest pecuniary interest" is embodied in the Due Process Clause of the Fourteenth Amendment. Second, under this rule there need not be a showing of actual bias, only a possible temptation to the average person as judge. Third, prejudice is presumed meaning that it is irrelevant whether or not there is sufficient evidence of guilt. Finally, there is language in both In Re Murchison, and

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[4] The presumption of prejudice that arises in instances of judicial bias is tantamount to those structural defects in the trial mechanism which defy harmless error analysis, such as that arising from denial of the right to counsel. Brecht v. Abrahamson, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1973).

Aetna Life suggesting that due process requires that there be an "appearance" of justice.[5]

This Court's decisions on judicial bias were applied by the Seventh Circuit in Del Vecchio v. Illinois Department of Corrections, 31 F.3d 1363 (7th Cir. 1994). The Court noted that Aetna and Murchison did not require disqualification based upon the "appearance of bias"; they simply held that there need not be actual bias against a particular party or cause. Id. at 1372. The Seventh Circuit stated that there must be "an actual incentive to find one way or another", and this meant a "strong, direct interest in the outcome of the case". Id. at 1372, 1373. Rejecting the "possible temptation" language of Tumey, the Court held that disqualification is only required when the biasing influence is so strong that it overcomes the presumption of "honesty and integrity of those serving as adjudicators". Id. at 1375.

In the decision in this case, the Seventh Circuit majority went even further in diluting the principals announced in Tumey, Murchison, and Aetna Life. In order to avoid the undesirable result of perhaps having to reverse a number of convictions, the

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[5] The Pennsylvania Supreme Court applied the appearance of fairness rule to reverse a number of criminal convictions in Interest of McFall, 617 A.2d 707 (Pa. 1992), where a trial judge was caught taking bribes and subsequently continued on the bench while acting as an informant for the FBI. The Court in that case recognized the possibility that a judge under those circumstances would be biased in favor of the prosecution, since the same prosecutor's office would later be called upon to decide whether she was deserving of leniency. While the case was not decided on due process grounds, the Pennsylvania Supreme Court stated that this Court's decision in Vasquez v. Hillary, supra, was "germane and informative". 617 A.2d 714, n.6.

majority held that even though Judge Maloney was not entitled to the usual presumption of integrity, Petitioner was nevertheless required to demonstrate actual bias on the part of Judge Maloney in this particular case. Thus, in holding that the Petitioner was not entitled to discovery in an effort to demonstrate that Maloney exhibited a pattern of general bias in favor of the prosecution in those cases in which he was not bribed, the majority stated:

> Even if the expedition discovered that Maloney did lean over backwards in favor of the prosecution in those cases in which he was not bribed, in order to conceal his taking of bribes in other cases, it would not show that he followed the practice in this case. This may be a case in which any judge would have ruled in favor of the government in the instances in which the defendants complain.

Bracy v. Gramley, supra at 691.

This Court should grant the writ in this case because the decisions of the Seventh Circuit are now completely out of line with this Court's prior cases on judicial bias in that they require a showing of actual bias in a particular case, which in most situations will be impossible to make. This means, in effect, that there can never be a reversal based upon judicial bias, no matter how egregious the misconduct, and this can only serve to greatly undermine the public's confidence in the judiciary. As the dissent in the Seventh Circuit correctly pointed out, Judge Maloney was himself an organized crime figure who converted his very office into a racketeering enterprise. 81 F.3d 699-701. This view of the situation is nothing more than a common sense appraisal, apparent at least to the average person, that there existed a "possible

temptation" on the part of Judge Maloney to be corrupt in all cases in which he was called upon to preside.

An additional ground for granting the writ is that there is a conflict between the Seventh and other Circuits as to the proper standard to be applied in determining when the Due Process clause requires that a judge be disqualified. Contrary to the holdings of the Seventh Circuit, the Tenth Circuit in Ferro v. Kirby, 39 F.3d 1462, 1478 (10th Cir. 1994) held that in certain circumstances, "likelihood of bias or appearance of bias" can be so substantial as to "create a conclusive presumption of prejudice". Similarly, the Ninth Circuit in Paradis v. Arave, 20 F.3d 950, 958 (9th Cir. 1994) reviewed a judicial disqualification issue under the appearance of bias standard.

The Seventh Circuit majority's reliance on Teague v. Lane, 489 U.S. 288, 103 L. Ed. 2d 334. 109 S. Ct. 1060 (1989) as an alternative basis of its decision is misplaced.[6] Teague held that new rules of law are inapplicable to cases pending on collateral review. A rule is new if not dictated by existing precedent at the time that the defendant's conviction became final. The Seventh Circuit majority was incorrect in determining that the right to a fair and impartial judge constitutes a new rule. Both the common law and this Court's decision in Tumey v. Ohio, supra, required the

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[6] Teague in this case does not constitute a jurisdictional bar because the State never raised the issue as a defense, nor argued it on appeal. See, Collins v. Youngblood, 497 U.S. 37, 41, 111 L. Ed. 2d 30, 110 S. Ct. 2715 (1990).

disqualification of a judge with the "slightest pecuniary interest".[7] As the Seventh Circuit dissent correctly observed:

> But surely common sense counts for something in the Teague analysis. The Greylord prosecutions had not yet taken place in 1981 when Bracy and Collins were tried, but the State of Illinois cannot claim to have been ignorant of the notion that bribery is illegal and that judges who accept bribes belong in prison, not on the bench. There is, in short, nothing surprising in the petitioners' claim.

81 F.3d 704.

Petitioner maintains that under well established precedent, there was a sufficient showing to require reversal of the conviction. Alternatively, the District Court should have allowed discovery pursuant to Federal Habeas Rule 6(a) so as to afford the Petitioner the opportunity to demonstrate that the corrupt activities of Judge Maloney were so pervasive as to have had an appreciable affect on those cases in which he did not receive bribes.[8] The Petitioner was faulted by the Seventh Circuit majority for not making a sufficient showing of prejudice, and at the same time was denied access to the basic procedural tools that he needed to be able to demonstrate the validity of his claim.[9]

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[7] Indeed, the Seventh Circuit majority was the author of a new rule in holding that Petitioner was required to make a showing of actual bias in this particular case.

[8] It is the duty of the District Court to provide the necessary discovery , ". . . where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and therefor entitled to relief . . . Harris v. Nelson, 394 U.S. 286, 300, 22 L. Ed. 2d 281, 89 S. Ct. 1623 (1969).

[9] As was aptly pointed out by the Seventh Circuit dissent: "We cannot, after all, have it both ways: we cannot criticize Bracy and Collins for speculation and at the same time deprive them of

B. The Rule Announced in this Case, That a Habeas Corpus Petitioner's Right to an Evidentiary Hearing Is Subject to a Higher Standard When His Claim Is Based upon Evidence Obtained Many Years After His Conviction, Is Contrary to This Court's Decision in Townsend v. Sain as well as Decisions of the Courts of Appeals and Creates an Unreasonable Risk That Serious Constitutional Violations Will Go Unredressed.

The key witness for the prosecution in securing Petitioner's 1981 conviction for murder was Morris Nellum, as the Illinois Supreme Court recognized in its opinion affirming this conviction on direct appeal. People v. Collins, 106 Ill. 2d 237, 488 N.E.2d 267, 277 (1985). In his federal habeas corpus petition, Petitioner alleged that he was denied due process of law by the State's knowing use of Nellum's perjured testimony at his trial. As support for this claim, Petitioner proffered Nellum's June, 1992 recorded statement to a defense investigator; Nellum's sworn statement to petitioner's counsel in July of 1992; and a transcript of the aborted deposition of Nellum in Arizona in April of 1993. These documents contained statements by Nellum that he lied at Petitioner's trial when he testified that he saw the victims being led to the car in the parking lot; he lied when he testified he heard gunshots and saw Murray Hooper at Roosevelt and Clark; he lied when he testified that he saw Petitioner in possession of a shotgun; and he lied when he denied that he had been beaten and threatened by the police. Nellum also stated that he was induced to testify falsely by one of the prosecutors at Petitioner's trial.

Despite these submissions, the District Court dismissed the petition without granting an evidentiary hearing on this claim, and

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the chance to render the theory anything more". 81 F.3d 699.

also denied Petitioner's alternative request for leave to depose Nellum. On appeal, the Court of Appeals framed the question before it as being what sort of showing a habeas petitioner must make to be entitled to an evidentiary hearing where his claim is based on evidence obtained "long after" his state conviction became final. 81 F.3d 692. Although agreeing with the District Court that the delay in obtaining the evidence of Nellum's perjury was not due to any lack of diligence on Petitioner's part, the Court of Appeals concluded that the fact of this delay required that Petitioner make a greater showing in support of his claim before he is entitled to a hearing. Id. at 692, 693. The court then applied this standard to affirm the District Court's denial of a hearing:

> We cannot of course determine the credibility of Nellum's recantation; we can only express our suspicions. These are germane, however, because an evidentiary hearing need not be granted on the basis of newly discovered evidence presented many years after the defendant's conviction became final unless there is a good reason to expect the hearing to result in an order for a new trial.

Id. at 694.

While acknowledging that the above proposition is not "clearly articulated in any case", the Court of Appeals concluded that it was "consistent with the results in the cases and sound as a matter of first principles". Id.

Review by this Court is warranted, as the new condition on a petitioner's right to an evidentiary hearing adopted in this case is in fact inconsistent with this Court's decision in Townsend v. Sain, 372 U.S. 293, 96 Ed. 2d. 770, 83 S. Ct. 745 (1963) and finds no support in the case law from the courts of appeals applying

Townsend. Moreover, the policy considerations relied upon by the court below do not support this restriction on a petitioner's ability to seek federal relief from a state conviction, and in this case sentence of death, which might well have been tainted by grave constitutional error.

In Townsend v. Sain, this Court held that when a petitioner alleges facts which, if true, would entitle him to relief, and these facts are in dispute, "the federal court in habeas corpus must hold an evidentiary hearing if the habeas applicant did not receive a full and fair evidentiary hearing in a state court . . ." 372 U.S. at 312. In so holding, the Court did not suggest that a different, more stringent standard might apply where a claim was based on facts not discovered until long after the state court proceeding. Indeed, later in its opinion, the Court specifically addressed the case of claims based on newly discovered evidence "which could not reasonably have been presented to the state trier of facts," and held that unless the allegation was frivolous or incredible the federal court must grant an evidentiary hearing. 372 U.S. at 317. Once again this Court never intimated that a different standard would apply depending on how long after the state proceeding the new evidence was obtained.

While acknowledging the first of the above-quoted passages from Townsend, the Court of Appeals concluded that it could not be taken literally based this Court's later statement in Blackledge v. Allison, 431 U.S. 63, 81, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977), that the district court "may employ a variety of measures in an

effort to avoid the need for an evidentiary hearing." 81 F.3d 693. However, when viewed in context, this statement does not undermine Townsend's standard for when a habeas petitioner is entitled to federal court factfinding on his constitutional claim. In Blackledge, this Court remanded the cause to the district court with directions that the petitioner be afforded a "full opportunity for presentation of the relevant facts" bearing upon his claim. 431 U.S. at 82-83. In so doing the Court made clear that an evidentiary hearing would be required unless alternative procedures such as discovery or expansion of the record under Habeas Rules 6 and 7 proved adequate to fully and fairly adjudicate petitioner's claim. The Court of Appeals' reliance on Blackledge is particularly inappropriate here. In this case, petitioner sought discovery as an alternative to his request for an evidentiary hearing but was denied that as well.

While asserting that the new standard it announced in this case "seems to us consistent with the results in the cases," the court below fails to cite a single example. To the contrary, in applying this court's decision in Townsend, the courts of appeals have ordered evidentiary hearings regardless of the passage of time. See, e.g., Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991) (evidentiary hearing ordered on Brady claim based on evidence discovered 15 years after trial); Kirkpatrick v. Whitley, 992 F.2d 491 (5th Cir. 1993) (evidentiary hearing ordered on claims of prosecutorial falsification and suppression of evidence based on evidence discovered 10-11 years after trial); Porter v. Singletary, 49 F.3d

1483 (11th Cir. 1995) (evidentiary hearing ordered on claim of judicial bias based on affidavits written 17 years after trial); see also East v. Scott, 55 F.3d 996 (5th Cir. 1995) (discovery ordered on claim of participation of private prosecutor based on mere allegations 13 years after trial).

The policy considerations offered by the Court of Appeals also do not support its new standard for the right to an evidentiary hearing. The court offers two major justifications for its departure from Townsend. First, the court writes that "[t]o reopen a criminal proceeding many years after the defendant was convicted and his conviction affirmed . . . is an extraordinary interference with the finality of the criminal process . . ." 81 F.3d 692-693. The court then asserts that "[t]his consideration makes judges hesitate to order new trials on the basis of newly discovered evidence unlikely to be reliable or, even if believed, to undermine confidence in the verdict." Id. at 693. These observations ignore the fact that the petitioner does not contend that his submissions entitle him to a new trial. He argues only that his submissions are sufficient to entitle him to an opportunity to investigate his claim and to have the validity of this claim determined at an evidentiary hearing. To allow discovery and a hearing on the facts of this case would not necessarily imperil finality concerns. If upon remand the District Court determined after a full airing of the issue that Nellum's recantation is not reliable, then relief would be denied. A new trial would be ordered only if the recantation is found to be genuine, as required by due process of law.

Second, the Court of Appeals relied on its conclusion that, because of the passage of time, the testimony at an evidentiary hearing itself might be unreliable and further noted that the State was not responsible for failure to hold an evidentiary hearing at an earlier time. Id. at 693. The first of these concerns does not warrant imposing a higher standard for evidentiary hearings as district courts are entirely capable of factoring in the passage of time in making credibility determinations. As to the other point, the Court of Appeals overlooks the fact that if Petitioner's claim that the State knowingly used Nellum's perjured testimony is true, the delay in uncovering this fact is indeed the fault of the State.

The Seventh Circuit majority was also incorrect in suggesting that the recantation was insufficient to justify an evidentiary hearing because Nellum only recanted a portion of his original testimony. 81 F.3d 694. The key factor overlooked by the Court is Petitioner's proffered evidence indicating subornation of perjury on the part of the State. False testimony which goes to the credibility of a key witness is sufficient to warrant a new trial even if it does not bear directly on guilt or innocence. Napue v. Illinois, 360 U.S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173 (1959). The question is whether, in light of the proffered impeachment, a reviewing court can be confident that the jury's verdict would have been the same. Kyles v. Whitley, ___ U.S. ___, 131 L. Ed. 2d 302, 115 S. Ct. 1555, 1575 (1995). Subornation of perjury on the part of the State casts in doubt the integrity of the entire evidence gathering process. If the government is willing to go so far as to

induce a witness to lie, there is reason to believe that it would be dishonest about other aspects of the investigation.

In conclusion, Petitioner has alleged facts supported by sworn statements of the State's key witness, which, if true, establish that his conviction and sentence of death were knowingly obtained by the State through the use of perjured testimony. This Court should grant certiorari to review the Court of Appeals' application of an unprecedented and unreasonably stringent standard which has deprived Petitioner of any opportunity to establish the truth of this claim.

VI.

CONCLUSION

The Petitioner requests that a writ of certiorari be issued to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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BRACY v. GRAMLEY
Cite as 81 F.3d 684 (7th Cir. 1996)

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4. Habeas Corpus ⇐467
For judicial bias to be automatic ground for reversal of state criminal conviction, habeas petitioner must show either actuality, rather than just appearance, of judicial bias, or possible temptation so severe that habeas court might presume actual, substantial incentive to be biased. 28 U.S.C.A. § 2254.

5. Habeas Corpus ⇐467
Rule that judicial bias of state trial court judge automatically entitles petitioner for habeas corpus to new trial must be interpreted circumspectly, with due recognition of cost to society of overturning convictions of guilty in order to vindicate abstract interest in procedural fairness. 28 U.S.C.A. § 2254.

6. Habeas Corpus ⇐467
Fact that state trial judge who presided over habeas petitioners' capital murder prosecutions was later convicted of having accepted bribes from criminal defendants in several other cases did not automatically mean that there was judicial bias in petitioners' capital murder prosecutions warranting new trial. 28 U.S.C.A. § 2254.

7. Constitutional Law ⇐269
Appearance of judicial impropriety does not constitute denial of due process warranting new trial. U.S.C.A. Const.Amend. 14.

8. Habeas Corpus ⇐468
Discovery is available in habeas corpus proceeding not as matter of course as in ordinary civil litigation but only if district judge finds "good cause" to order discovery. Rules Governing § 2254 Cases, Rule 6(a), 28 U.S.C.A. foll. § 2254.

9. Habeas Corpus ⇐468
Habeas petitioners were not entitled to depose certain persons and witnesses who were most intimately associated with state trial judge who was convicted of having accepted bribes from criminal defendants in several other cases, in order to determine whether there was actual bias by judge in their case, where even if discovery showed that judge leaned over backwards in favor of prosecution in cases in which he was not bribed, in order to conceal his taking of bribes in other cases, it would not show that he followed practice in petitioner's capital murder prosecutions. 28 U.S.C.A. § 2254.

10. Criminal Law ⇐641.13(2.1)
Defense counsel's failure to object to selection of juror who was wife of state judge who had once sentenced codefendant to prison for armed robbery did not constitute ineffective assistance of counsel in defendants' capital murder prosecution; only possible deficient performance was defense counsel's statement to jury that juror's husband, although not identified as such, had once given codefendant most severe sentence that he had ever received, and likely prejudice from this statement was too slight to warrant new trial, or evidentiary hearing. U.S.C.A. Const.Amend. 6.

11. Criminal Law ⇐726
Prosecutor's statement, in response to defense counsel's accusations that prosecutor made prosecution witness tell lie in order to obtain capital murder conviction, that he would not risk his professional career, his family, or his future by putting witness on stand and making him lie did not constitute improper "vouching" for truth of witness's testimony but, rather, prosecutor was merely denying that prosecutor had made witness lie.

See publication Words and Phrases for other judicial constructions and definitions.

12. Habeas Corpus ⇐603
To reopen state criminal proceeding many years after habeas petitioner was convicted and his conviction affirmed is extraordinary interference with finality of the criminal process and requires demonstration that hearing would probably yield evidence that would require new trial at which petitioner would have substantial chance of acquittal. 28 U.S.C.A. § 2254.

13. Habeas Corpus ⇐742
District court may employ variety of measures in effort to avoid need for evidentiary hearing on disputed facts, including direction to expand record to include evidentiary materials that may resolve factual dispute without hearing. Rules Governing § 2254 Cases, Rule 7, 28 U.S.C.A. foll. § 2254.

commentary, which requires consideration of any prior conviction receiving any points under the criminal history guideline, even if that conviction was not separately considered under section 4A1.1(a). Krzeminski's conviction for felonious assault was properly assessed a point under section 4A1.1(f), and the commentary to section 2K2.1 therefore requires that it be counted in setting Krzeminski's base offense level. *See* U.S.S.G. § 2K2.1 comment. (n.5). Because Krzeminski does not suggest that Application Note 5 "violates the Constitution or any federal statute, or that the note is inconsistent with, or a plainly erroneous reading of," section 2K2.1, that note is authoritative and binds us here. *See Stinson v. United States*, 508 U.S. 36, 37–39, 113 S.Ct. 1913, 1915, 123 L.Ed.2d 598 (1993).

Krzeminski's sentence is AFFIRMED.

William BRACY, Petitioner-Appellant,
v.
Richard B. GRAMLEY, Respondent-Appellee.

Roger COLLINS, Petitioner-Appellant,
v.
George C. WELBOREN, Respondent-Appellee.

Nos. 94-3881, 94-3887.

United States Court of Appeals, Seventh Circuit.

Argued Nov. 29, 1995.
Decided April 12, 1996.
Rehearing and Suggestion for Rehearing En Banc Denied June 26, 1996.*

Habeas Petitioners' armed robbery, aggravated kidnapping, and murder convictions were affirmed, 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267, by the Illinois Supreme Court. The trial court's denial of postconviction relief was also affirmed, 153 Ill.2d 130, 180 Ill.Dec. 60, 606 N.E.2d 1137. Petitioners sought federal habeas corpus relief. The United States District Court for the Northern District of Illinois, William T. Hart, J., denied petitions. Petitioners appealed. The Court of Appeals, Posner, Chief Judge, held, in an apparent case of first impression, that: (1) petitioners were not entitled to new trial despite fact that state trial judge who presided over their capital murder prosecution was later convicted of having accepted bribes from criminal defendants in several other cases; (2) petitioners were not entitled to additional discovery to further examine possibility that trial judge was biased; (3) prosecutor did not commit prejudicial misconduct; and (4) prosecution witness' recantation of part of his testimony did not warrant new trial.

Affirmed.

Ilana Diamond Rovner, Circuit Judge, dissented and filed opinion.

1. Habeas Corpus ⇐450.1, 452
With few exceptions, person convicted in state court may not obtain order for new trial from federal habeas court on basis of constitutional errors committed at trial unless errors resulted in actual prejudice, or, equivalently, unless they substantially influenced verdict. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⇐712.1
Confession of alleged accomplice who was tried separately from habeas petitioners could not be used to show that state trial court errors of which petitioners complained were unlikely to have affected guilty verdict, since confession implicated petitioners in murders and was thus inadmissible at their trial.

3. Habeas Corpus ⇐467
Judicial bias is structural defect in constitution of trial mechanism, as distinct from mere trial error, that automatically entitles petitioner for habeas corpus to new trial. 28 U.S.C.A. § 2254.

* Judges Ripple, Rovner, and Diane P. Wood voted to grant the petition for rehearing en banc.

APPENDIX B

14. Habeas Corpus ⇐742

When request for federal evidentiary hearing is based on evidence gathered long after event, too late to be presented to state courts, which cannot be faulted for having failed to provide habeas petitioner with evidentiary hearing, federal court is entitled to insist, as precondition to granting hearing, that petitioner demonstrate that he have "colorable claim," meaning by this not that it be nonfrivolous on its face but that there be some reason to think it valid. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions

15. Habeas Corpus ⇐497

Knowing use of perjured testimony by prosecution, although very serious infringement of constitutional rights of criminal defendant, is not automatic basis for new trial; there must be reasonable likelihood that violation affected verdict. U.S.C.A. Const. Amend. 6.

16. Habeas Corpus ⇐491, 497

Even if prosecution witness' recantation of part of his testimony, approximately 14 years after defendants' capital murder convictions, was believed over that of prosecutors and police, thus establishing that prosecution made knowing use of perjured testimony that incriminated third murderer, new trial would not be warranted, where witness' recantation occurred many years after capital murder trial, where evidence of defendants' guilt was very powerful, and where core of witness' testimony, including testimony that defendants committed murders, was not recanted.

17. Criminal Law ⇐977(3)

Defense counsel were not entitled to continuance immediately after jury convicted defendants of capital murder to obtain evidence of mitigating circumstances for submission at death penalty hearing, as counsel were aware that, in Illinois, sentencing hearing perforce follows immediately upon trial.

18. Criminal Law ⇐1208.1(6)

Under Illinois law, existence of aggravating circumstance need only be proved by preponderance of evidence, provided that at least one such circumstance has been proved beyond reasonable doubt, thus making defendant eligible for death sentence. S.H.A. 720 ILCS 5/9–1(f).

19. Criminal Law ⇐641.13(7)

Defense counsel's failure to present alibi evidence during death penalty sentencing hearing that might have persuaded jury that defendant had not committed out-of-state murders for which defendant was charged but not convicted did not constitute ineffective assistance of counsel, where defendant was later convicted and sentenced to death for out-of-state murders. U.S.C.A. Const. Amend. 6.

20. Criminal Law ⇐726

Prosecutor's remark in closing argument during sentencing phase of defendant's capital murder prosecution that killing during war was not violation of Fifth Commandment of Bible was not fatally prejudicial, where remark was merely response to defense counsel's argument that to sentence defendants to death would violate Ten Commandments, and where prosecutor was pointing out that there was such a thing as justified homicide and that execution of duly convicted and sentenced murderer was, plausibly, illustration of it.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division. Nos. 93 C 5328, 93 C 5282—William T. Hart, Judge.

Martin Carlson, Chicago, IL, Gilbert H. Levy (argued), Seattle, WA, for Bracy.

Rita M. Novak, Office of the Atty. Gen., Kevin Sweeney (argued), Office of the State's Atty. of Cook County, Criminal Appeals Div., Chicago, IL, for Gramley.

Stephen E. Eberhardt (argued), Marshall J. Hartman, Chicago, IL, Robert H. Farley, Jr., Naperville, IL, for Collins.

James E. Ryan, Office of the Atty. Gen., Steven J. Zick, Office of the Atty. Gen., Criminal Appeals Div., Chicago, IL, Kevin Sweeney (argued), Office of the State's Atty. of Cook County, Criminal Appeals Div., Chicago, IL, for Welborn.

Before POSNER, Chief Judge, and CUMMINGS and ROVNER, Circuit Judges.

POSNER, Chief Judge.

William Bracy and Roger Collins were convicted in an Illinois state court in 1981 of three murders committed the previous year. They were sentenced to death and after exhausting their state remedies (see *People v. Collins*, 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267 (1985); 153 Ill.2d 130, 180 Ill.Dec. 60, 606 N.E.2d 1137 (1992)) sought habeas corpus in federal district court. Judge Hart denied them relief, *United States ex rel. Collins v. Welborn*, 868 F.Supp. 960 (N.D.Ill. 1994), and they have appealed, arguing that the state denied them due process of law both at their trial and in the sentencing hearing.

The victims had been taken, bound, from an apartment in a building on the south side of Chicago and had been driven to a viaduct and there shot to death with pistols and a shotgun. The main prosecution witness was Morris Nellum, an accomplice who testified for the government in exchange for being charged only with concealing a felony and promised that the state would recommend a sentence of only three years. (In fact he received only two and a half years—and of probation, not prison.) Nellum testified that Collins had summoned him to the apartment, where he had watched as the victims were led out of the apartment and into a waiting automobile by Bracy, Collins, and a third man, Hooper. (Hooper was tried separately, convicted, and sentenced to death. See *People v. Hooper*, 133 Ill.2d 469, 142 Ill.Dec. 93, 552 N.E.2d 684 (1989), affirming the conviction but vacating the death sentence. On remand, Hooper was again sentenced to death, and this time the Supreme Court of Illinois affirmed. 1996 WL 30647 (Ill. Jan. 25, 1996).)

Collins told Nellum to drive Collins's car, which was parked near the apartment building, to the viaduct. Collins and Hooper then got into the car that contained the three victims and drove away, followed by Bracy in another car. Nellum waited a few minutes and then drove to the viaduct as well. As he approached it, he heard shots. He stopped the car. Collins jumped in and they sped off. Later the two drove to Lake Michigan and Collins threw two pistols into the lake. Nellum, after he was arrested, told the police where the guns had been dumped, and the police found them there. Bullets found in the bodies of the dead men were of the type fired by these guns, although the guns had so deteriorated as a result of their prolonged immersion in the lake that no positive ballistics identification was possible.

Nellum's testimony was corroborated not only by the finding of the guns but also by testimony from a resident of the apartment building who saw the group leaving on the fatal night. She identified Collins, Nellum, and Hooper in court as resembling three of the men she had seen. She testified that one of the three had been wearing a wide-brimmed hat—and Nellum testified that Collins had indeed been wearing such a hat that night. Further corroboration of Nellum's testimony came from another resident, who testified to having seen Bracy and Collins in the building that night, and from a witness who testified that Bracy had borrowed a pistol from her before the murders and that afterward, when they were in a bar and she asked for the pistol back, he had told her that he had murdered some people with it. One of the pistols found in the lake on the basis of Nellum's tip turned out to be the pistol that she had lent Bracy. This witness also testified that in the same bar she had seen a woman give Bracy a sawed-off shotgun that Bracy had then handed to an employee of the bar, apparently for safekeeping. Bracy and Collins testified on their own behalf, denying any participation in the murders, and presented a parade of alibi witnesses of dubious credibility.

[1, 2] The evidence of guilt presented at the trial was compelling, and while there is a question, as we shall see, about the veracity of some of Nellum's testimony, even if that question were resolved in the defendants' favor we would have no basis for doubting the guilt of either Bracy or Collins. Hooper was tried separately because his confession

implicated them and the confession is further evidence, though of course not evidence presented to the jury in our case, that they really did, along with Hooper, commit the murders. Because this evidence was inadmissible it cannot be used to show that the errors of which Bracy and Collins complain are unlikely to have affected the verdict. Cf. *Sullivan v. Louisiana*, 508 U.S. 275, 278–79, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); *United States v. Ross*, 77 F.3d 1525 (7th Cir. 1996). But the evidence that was admissible shows that they were guilty and this is important because, with a few exceptions, a person convicted in a state court may not obtain an order for a new trial from a federal court on the basis of constitutional errors committed at the trial unless the errors resulted in actual prejudice, or, equivalently, unless they substantially influenced the verdict, *Brecht v. Abrahamson*, 507 U.S. 619, 637–38, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993), or, in other words, were likely to have made the difference between conviction and acquittal.

The only error that the petitioners argue requires a new trial regardless of whether it was prejudicial is that the judge who presided at their trial was later convicted of having accepted bribes from criminal defendants in several other cases (including murder cases) around the time when Bracy and Collins were tried. *United States v. Maloney*, 71 F.3d 645, 650–52 (7th Cir.1995). There is no suggestion that Bracy and Collins bribed or offered to bribe him. The argument rather is that Judge Maloney came down hard on criminal defendants in cases in which he was *not* bribed, to avoid suspicion that he was on the take, to cancel any bad impression that his acquittals might make on the voters—maybe even to make defendants desperate to bribe him, fearing he would punish them with adverse rulings if they did not. There is no evidence, but only conjecture, that Maloney actually did lean over backwards in favor of the prosecution in this or any other case in which he was not bribed; did, that is, rule against the defense only because he was taking bribes in other cases. Collins argues that evidence is unnecessary, and Bracy that if it is necessary their request for discovery should have been granted.

[3, 4] A judge could be biased and yet the bias not affect the outcome of the case. But judicial bias is one of those "structural defects in the constitution of the trial mechanism," as distinct from mere "trial errors," that automatically entitle a petitioner for habeas corpus to a new trial. *Brecht v. Abrahamson*, *supra*, 507 U.S. at 629, 113 S.Ct. at 1717; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at 278–79, 113 S.Ct. at 2081; *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927); *Tyson v. Trigg*, 50 F.3d 436, 442 (7th Cir.1995). What is bias? Defined broadly enough, it is a synonym for predisposition, and no one supposes that judges are blank slates. There are prosecution-minded judges, and defense-minded judges, and both sorts have predispositions—biases that place an added burden on one side or the other of the cases that come before them. Yet no one supposes that the existence of such biases justifies reversal in cases where no harmful errors are committed. The category of judicial bias is ordinarily limited to those predispositions, real or strongly presumed, that arise from some connection pecuniary or otherwise between the judge and one or more of the participants in the litigation. Whether the present case even fits that mold may be doubted, but, in any event, for bias to be an automatic ground for the reversal of a criminal conviction the defendant must show either the actuality, rather than just the appearance, of judicial bias, "or a possible temptation so severe that we might presume an actual, substantial incentive to be biased." *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1380 (7th Cir.1994) (en banc); see *Branion v. Gramly*, 855 F.2d 1256, 1268 (7th Cir.1988); *Margoles v. Johns*, 660 F.2d 291, 296–97 (7th Cir.1981) (per curiam). In rejecting reversal on the basis of a mere appearance of partiality or bias *Del Vecchio* relied in part on a presumption, obviously inapplicable here, that judicial officers perform their duties faithfully. 31 F.3d at 1372–73. But that was not the core of the decision. The fundamental reason that an appearance of impropriety is not alone enough to require a new trial is that it provides only a weak basis for supposing the original trial an unreliable test of the issues presented for decision in it. The fact that Maloney had an incentive to favor the prosecution in cases in which he was not bribed does not mean that he did favor the prosecution in such cases more than he would have done anyway.

[5] Sometimes—this is the second half of the test that we quoted from *Del Vecchio*—the incentive to engage in biased behavior is so great that inquiry into the actuality of that behavior is pretermitted. *Id.* at 1372–73; see also *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). This rule recognizes both the practical impediments to obtaining reliable evidence of a judge's motives and the difficulty of overcoming public skepticism of judicial motives when the temptation to impropriety is great. But the automatic rule must be interpreted circumspectly, with due recognition of the cost to society of overturning the convictions of the guilty in order to vindicate an abstract interest in procedural fairness. The fact that the people for obvious practical reasons do not have judicially enforceable rights to the protection of the criminal laws (though they do have judicially enforceable rights against discriminatory withdrawal of that protection) does not warrant a court in disregarding their interests when the court is formulating rules of constitutional law. Accepting Collins's contention would require a new trial in *every* case, jury and nonjury, capital and noncapital, in which a judge later found to be corrupt had presided and the defendant had been convicted, even though the judge had not been bribed by the prosecutor. (If the *defendant* had bribed the judge and been acquitted, the double jeopardy clause probably would not bar reprosecution, *Renard v. State*, 481 S.W.2d 427, 430 (Tex.Crim.App.1972)—the defendant would never have been in any actual "jeopardy." The issue has not been definitively resolved, however, David S. Rudstein, "Double Jeopardy and the Fraudulently-Obtained Acquittal," 60 *Mo. L. Rev.* 607 (1995), and obviously need not be in order to decide the present case.) *Any* judge who is on the take will have an incentive to adopt Judge Maloney's alleged strategy and thus always do his best (or worst) to see to it that a defendant who does not bribe him is convicted. A principled acceptance of Collins's argument would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes. The fact that this is a death case magnifies the appearance of impropriety but is irrelevant to an issue that goes to the propriety of conviction rather than merely to that of the sentence.

The assumption underlying Collins's argument is that a judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes. The assumption is plausible but the consequences are unacceptable. If we were to inquire into the motives that lead some judges to favor the prosecution, we might be led, and quickly too, to the radical but not absurd conclusion that *any* system of elected judges is inherently unfair because it contaminates judicial motives with base political calculations that frequently include a desire to be seen as "tough" on crime. See generally Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," 62 *U.Chi.L.Rev.* 689, 726–29 (1995).

No precedent has been cited to us for invalidating a judge's rulings in a case in which he is known not to have taken a bribe, simply because he took bribes in other cases. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), disapproved the use of novel grounds to grant relief on an application for habeas corpus. The state does not cite *Teague*, but we are free to apply it anyway. *Caspari v. Bohlen*, — U.S. —, —, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994); *Eaglin v. Welborn*, 57 F.3d 496, 499 (7th Cir.1995) (en banc). The argument for automatic reversal is not compelling even if its lack of a secure grounding in prior cases and its alarming potential irradiation of future cases are ignored. While a corrupt judge might decide to tilt sharply to the prosecution in cases in which he was not taking bribes—to right the balance as it were—it is equally possible that he would fear that by doing so he would create a

would not require formal discovery at all, since Maloney's cases are a matter of public record. The third too; in the first instance at any rate, all it would require is a perusal of the transcript of Maloney's trial. It is true that a part of the trial record was sealed, but it was unsealed in August of 1994, so that the petitioners' lawyers have had a year and a half to look for clues in that record. The second proposal is for a fishing expedition. Even if the expedition discovered that Maloney did lean over backwards in favor of the prosecution in cases in which he was not bribed, in order to conceal his taking of bribes in other cases, it would not show that he followed the practice in this case. This may be a case in which *any* judge would have ruled in favor of the government in the instances of which the defendants complain.

A party to an ordinary civil suit need not demonstrate good cause in order to be permitted to conduct discovery. A petitioner for habeas corpus must, because collateral attack on a criminal judgment that has become final is an extraordinary remedy. Without the aid of formal discovery the petitioners' able counsel could have (and perhaps have) studied the pattern of Judge Maloney's rulings in cases in which he did and cases in which he did not take bribes, could have (and perhaps have) inventoried his rulings in the present case to see whether they consistently favored the prosecution, and could have (and perhaps have) studied the record of Maloney's prosecution by the United States for clues to their theory of bias. If none of these public sources of information has yielded any evidence of bias in our case—and none has—the probability is slight that a program of depositions aimed at crooks and their accomplices and likely to be derailed in any event by real and feigned lapses of memory will yield such evidence.

We do not make light of judicial corruption. It has tainted the judicial system of Illinois, caused unjust acquittals, jeopardized convictions, tarnished the legal profession, and raised profound doubts not only about the state's method of selecting judges but also about the entire political culture of the state. But in the circumstances of this case, corruption is *not* a constitutional ground for vacating the petitioners' convictions.

[10] The petitioners raise another issue of bias, this in the context of a claim of ineffective assistance of counsel. One of the jurors was the wife of an Illinois state judge who had once sentenced Bracy to prison for armed robbery. The defendants' lawyer was aware of this but did not object to her being selected for the jury. Toward the end of the trial, however, the lawyer revealed to the jury that Judge Downing, the juror's husband (though not identified as such to the jury), had once given Bracy the most severe sentence that he had ever received prior to this case. The petitioners argue that, thus reminded that her husband had dealt harshly with Bracy on a prior occasion, Mrs. Downing was bound to be prejudiced against Bracy and perhaps therefore his codefendant as well. This is too thin a speculation to justify a new trial on the ground of ineffective assistance of counsel and we are not persuaded by the proposal that in lieu of ordering a new trial we order the district court to conduct an evidentiary hearing at which Mrs. Downing would be questioned about what she was thinking when she was a member of the jury fourteen years ago. The defendants were content to have as a juror the wife of the judge *who they knew had sentenced Bracy to a long prison term*, and the decision to accept her is not and could not plausibly be claimed to be ineffective assistance. Only the lawyer's slip of the tongue that revealed this fact to her could be thought ineffective assistance. But if so, the likely prejudice was too slight to warrant a new trial, or an evidentiary hearing unlikely to be any more fruitful than discovery concerning Judge Maloney.

[11] Another alleged irregularity at trial is the judge's failure to strike remarks made by the prosecutors in closing argument. The worst remark to which an objection has been preserved was: "and if you think I would jeopardize my license, my family, my children, my future to put [a peripheral witness named Dorfman] on in a case and make him lie...." This is claimed to be "vouching" for the truth of the witness's testimony, which prosecutors are not supposed to do, because

pattern of inconsistent rulings that would lead people to suspect he was on the take. When a severely prosecutorial judge sides unexpectedly with the defense in some arbitrary subset of cases, corruption is a possible explanation. If instead the judge maintains a generally pro-defendant stance, he may jeopardize his chances for reelection (Maloney was appointed to a vacancy, but he had to stand for election, and did so, when the term of his original appointment expired), and the number and size of the bribes he receives may be diminished because defendants will be less fearful of the consequences of not bribing him. But he may also still any suspicions that he is on the take, because his rulings in favor of defendants in cases in which he is bribed will not stand out.

This was a jury trial rather than a bench trial, moreover, and acquittals in jury trials are more likely to be blamed on the jury than on the judge. When as sometimes happens a judge campaigning for election is accused of never having convicted a rapist or sentenced a murderer to death, cf. *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 225 (7th Cir.1993), the reference is to bench trials, where the decision to convict or acquit is the judge's, and to sentences handed down by judges rather than, as in capital cases in Illinois, by juries unless the defendant waives a jury. It is in cases tried to the bench that the judge as decision-maker must shoulder full responsibility for the decision. When he merely presides, his responsibility for the outcome is less. We do not understand Bracy and Collins to be arguing that Maloney was more likely to sentence them to death, as distinct from being more likely to rule against them during the trial, as a consequence of his taking bribes in other cases.

We are, it is true, speculating about the likely impact of Maloney's corruption on the rulings that he made at the trial of these petitioners. We also acknowledge the possibility that the cumulative effect of those rulings was greater than we imagine. *Tyson v. Trigg, supra*, 50 F.3d at 439. But the defendants are speculating too. Some of Maloney's rulings went against the defendants and obviously those are the ones they complain about, but they have not shown that there were so few rulings in their favor that the judge *must* have been biased in favor of the government. To show this would not have required an investigation, but merely a review of the transcript of the trial. It is unlikely that the specific rulings of which the defendants complain either were the product of a corrupt backward bending in the government's favor or influenced the jury's verdict. The Supreme Court of Illinois did not find any errors in the rulings.

[8, 7] The argument that a judge who accepts bribes in some cases is corrupt in all is not a sufficiently compelling empirical proposition to persuade us to treat this case as if Judge Maloney had taken a bribe from the government to convict. If the argument is rejected, ours is a case in which there is merely an appearance of impropriety in the judge's presiding, and an appearance of impropriety does not constitute a denial of due process. Appearance of impropriety there was. We know this because if a judge were under indictment for accepting bribes he would not be permitted to hear any cases. Ill. S.Ct. R. 56(a)(1). But without more a defendant's conviction cannot be set aside.

[8, 9] The petitioners also seek discovery, so that they can try to find out whether there was actual bias by Judge Maloney at their trial. Discovery is available in a habeas corpus proceeding not as a matter of course as in an ordinary civil litigation but only if the district judge finds "good cause" to order discovery. Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts; *Kost v. Scott*, 55 F.3d 996, 1001 (5th Cir.1995). The petitioners want to study a large sample of Judge Maloney's cases to see whether a pattern of favoring the prosecution in cases in which he was not bribed emerges, to depose "some of those persons and witnesses who were most intimately associated with Judge Maloney who may be able to provide material information on his behavior in cases where he didn't get bribes," and to get hold of any evidence that the federal government might have obtained in its prosecution of Maloney that he really did lean over backwards in favor of the government in cases in which he was not bribed—perhaps in this very case. The first proposal

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

June 26, 1996

Before

Hon. Richard A. Posner, Chief Circuit Judge
Hon. Walter J. Cummings, Circuit Judge
Hon. John L. Coffey, Circuit Judge
Hon. Joel M. Flaum, Circuit Judge
Hon. Frank H. Easterbrook, Circuit Judge
Hon. Kenneth F. Ripple, Circuit Judge
Hon. Daniel A. Manion, Circuit Judge
Hon. Michael S. Kanne, Circuit Judge
Hon. Ilana Diamond Rovner, Circuit Judge
Hon. Diane P. Wood, Circuit Judge
Hon. Terence T. Evans, Circuit Judge

WILLIAM BRACY, *Petitioner-Appellant*, v. RICHARD B. GRAMLEY, *Respondent-Appellee.*	No. 94-3801	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
ROGER COLLINS, *Petitioner-Appellant*, v. GEORGE C. WELBORN, *Respondent-Appellee.*	No. 94-3807	Nos. 93 C 5328, 93 C 5282 William T. Hart, *Judge.*

Order

On April 26, 1996, petitioners-appellants filed a petition for rehearing with suggestion of rehearing *en banc*. A vote of the active members of the Court was requested, and a majority has voted to deny a rehearing *en banc*.* The petition is therefore DENIED.

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* Judges Ripple, Rovner, and Diane P. Wood voted to grant the petition for rehearing *en banc*.

APPENDIX A

it crosses the line from advocacy to testimony. Defense counsel had accused the prosecutor of wanting to convict Collins so badly that he "made a guy [Dorfman] come in here and tell you something that he knows is not in that report." In other words, defense counsel was accusing the prosecutor of having made a witness tell a lie. The prosecutor denied this in the passage that we have quoted. This was not vouching for the truth of the witness's testimony. It was denying that the prosecutor had made the witness lie. And anyway vouching is not a violation of any specific constitutional right but at most an irregularity that if shown in a particular case to have been likely to have led to the conviction of an innocent man might be held to be a denial of due process of law in that case. *Rodriguez v. Peters*, 63 F.3d 546, 558 (7th Cir.1995); *Kappos v. Hanks*, 54 F.3d 365, 367 (7th Cir.1995). No such inference is possible here.

The next question is the standard for granting an evidentiary hearing when, long after the conviction of a criminal defendant, a prosecution witness steps forward and recants a part of his testimony. Many years after the trial of Bracy and Collins, a private investigator retained by the defendants' counsel talked to Morris Nellum. Later Nellum was interviewed by Bracy's lawyer and a transcript was made of that interview. Nellum did not recant his testimony that Bracy and Collins had committed the murders. He merely tried to exonerate the third murderer, Hooper. But in explaining how he had come to testify against Hooper he made lurid accusations that the police had beaten Bracy and him (Nellum) and threatened him with a sledgehammer and that the prosecutors had told him to lie about such details as when he had first told the police where the pistols used in the murders had been pitched. The jury had been told that Nellum had at first denied knowing the whereabouts of the gun but not that the prosecutors had told him to lie about that denial.

Nellum later repeated a part of his recantation in a deposition that was interrupted when an Illinois prosecutor who had talked to him after the interview with defense counsel, and an Arizona prosecutor, reminded Nellum that he had said he only wanted to testify in front of a judge. In seeking an evidentiary hearing the defendants' lawyers rely primarily on the transcript of the interview rather than on the interrupted deposition. They argue that it creates enough suspicion that the prosecutors knowingly used perjured testimony at the trial to require an evidentiary hearing to get to the bottom of Nellum's recantation.

None of the alleged lies concerns a matter vital to the government's case. Nellum did not deny that he was present when the victims were removed from the apartment, that he drove to the viaduct to pick up Collins, and that he saw Collins toss the pistols into Lake Michigan. Yet if the jury had thought that the police had beaten Nellum and that the prosecutors had coerced him to lie, albeit about details of the offense rather than about the involvement of the defendants, his credibility, already compromised because he was testifying in exchange for the promise of a sentence extraordinarily lenient considering that he had been an accomplice in three murders, might have been so far impaired that the jury would have disbelieved the core as well as the periphery of his testimony.

[12] Given this possibility, we must consider what showing based on newly discovered evidence that a constitutional violation may have been committed at trial (here, the knowing use of perjured evidence by the prosecution) is necessary before a hearing to determine the truthfulness of the evidence is required. The state argues only weakly that the petitioners should have obtained the recantation sooner, in which event it would not be newly discovered evidence in the relevant sense. *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1536 (10th Cir.1994). So the request for an evidentiary hearing is not barred by a want of diligence, and furthermore it cannot be a condition of the grant of such a hearing that the movant already have in his possession all the evidence that he seeks to develop in the hearing. But equally it cannot be enough that the petitioner has found *some* new evidence. To reopen a criminal proceeding many years after the defendant was convicted and his conviction affirmed (which in this case occurred more

than ten years ago) is an extraordinary interference with the finality of the criminal process and requires a demonstration that a hearing would probably yield evidence that would require a new trial at which the petitioner would have a substantial chance of acquittal. In view of the passage of time since, and the disordered social milieu in which, the petitioners committed these murders, it is doubtful whether they could be retried with good prospects for an accurate verdict, even though their guilt of multiple murders committed in cold blood is not in doubt. They cannot be blamed for the fact that it has taken fifteen years for their challenge to their convictions to come to this court; so far as we can tell, they have not abused the postconviction process. But one consequence of the extraordinary delays that are tolerated in capital cases in order to minimize the risk of mistaken execution is that an order for a new trial issued toward the end of the normal postconviction process may have the practical effect of an acquittal. This consideration makes judges hesitate to order new trials on the basis of newly discovered evidence unlikely to be reliable or, even if believed, to undermine confidence in the verdict.

[13] We are mindful that in *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963), the Supreme Court stated that "where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing" unless the petitioner received a full and fair hearing in state court. This passage from the *Townsend* opinion continues to be quoted approvingly. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 399, 113 S.Ct. 853, 860, 122 L.Ed.2d 203 (1993). But it cannot be taken literally, since we know that the district court "may employ a variety of measures in an effort to avoid the need for an evidentiary hearing" on disputed facts, *Blackledge v. Allison*, 431 U.S. 63, 81, 97 S.Ct. 1621, 1633, 52 L.Ed.2d 136 (1977), including a direction to expand the record to include evidentiary materials that may resolve the factual dispute without a hearing. *Id.* at 82, 97 S.Ct. at 1633; Rule 7 of the Rules Governing Section 2254 Cases in the United States District Courts.

[14] Likewise, not any old allegation of newly discovered evidence will trigger an evidentiary hearing; the allegation must be "substantial." *Townsend v. Sain*, *supra*, 372 U.S. at 313, 83 S.Ct. at 757. That is common sense. Had Judge Hart in his order of August 24, 1994, granted rather than denied the motion for an evidentiary hearing, and the hearing been held later that year, the witnesses, primarily Nellum and the prosecutors and police involved in the investigation and prosecution of the murder cases against Bracy, Collins, and Hooper, would have been testifying about events that had occurred thirteen to fourteen years earlier. So long an interval between the events and the testimony about the events would cast a pall of doubt over the reliability of the testimony. Ours is not the typical situation in which an evidentiary hearing is granted in a postconviction proceeding. Not only is the interval typically shorter, as in *Daniels v. United States*, 54 F.3d 290 (7th Cir.1995), and *Barkauskas v. Lane*, 878 F.2d 1031, 1034 (7th Cir.1989), but when it is as long as it would be here this is usually because the state failed to give the petitioner a full and fair hearing, and the state must not be rewarded for its own denials of due process. When the request for a federal evidentiary hearing is based on evidence gathered long after the event—too late to be presented to the state courts, which cannot be faulted for having failed to provide the petitioner with an evidentiary hearing—the federal court is entitled to insist, as a precondition to granting a hearing, that the petitioner demonstrate that he have a "colorable" claim, meaning by this not that it be nonfrivolous on its face (the usual meaning of "colorable") but that there be some reason to think it valid. *Siripongs v. Calderon*, 35 F.3d 1308, 1314 (9th Cir. 1994).

[15, 16] Even if Nellum testified under oath to all that he had told Bracy's lawyer and even if his testimony were believed over that of prosecutors and police almost certain to testify contrary to Nellum, thus establishing that the prosecution made knowing use of perjured testimony, a new trial would not be warranted. The knowing use of perjured testimony by the prosecution, although a

very serious infringement of the constitutional rights of a criminal defendant, is not an automatic basis for a new trial. There must be a reasonable likelihood that the violation affected the verdict. *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976); *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir.1995). The evidence of Bracy's and Collins's guilt was very powerful and evidence brought out at the evidentiary hearing which if repeated at a new trial would merely cast doubt on Nellum's credibility would be unlikely to sway a jury. We are imagining a new trial at which all the evidence is the same except that Nellum changes some of the details of his earlier testimony, and, when the changes are thrown in his face, makes lurid accusations against the police and the prosecutors. The core of Nellum's testimony would be unaffected and would be richly corroborated by the testimony of the other witnesses whose evidence we summarized at the beginning of this opinion (assuming those witnesses can be found and persuaded to testify or the transcript of their original testimony is admitted at the second trial), and by the guns. Of course we cannot be certain that once Nellum started down the recantation path he would go no further than he has done to date. Having completed his bargained for sentence long ago he has no incentive to cooperate with the prosecution. But the more sweeping his recantation, the less credible it is likely to be.

Prosecutors frequently rely heavily on the testimony of members of the criminal class, such as Nellum, who did not "go straight" after completion of his light sentence for his role in the murders. They have no choice. These witnesses from the criminal demimonde are not only unreliable witnesses, as the defendants' counsel emphasized to the jury in asking them to disbelieve Nellum's testimony; they are unreliable *people*. We would be imperiling the punishment of dangerous criminals if we established a precedent that would invite the lawyers for convicted defendants (especially in capital cases, not only because of the stakes involved but also because few prisoners other than those under sentence of death are represented in postconviction proceedings) to pester these witnesses to recant many years after they had testified. We do not suggest that the lawyers would act unethically. In the American system of justice the zealous representation of a client is a duty, not an ethical lapse. And in some cases the recantations would be genuine and material and if so they would be a proper basis for ordering a new trial despite the passage of time. But we are given no reason to suppose that Nellum's recantations are either genuine or material. His original testimony was amply corroborated and his recantation preserved the core of the original testimony intact. And while the interview with Bracy's lawyer occurred in 1992 and the abortive deposition the following year, in the more than two years that have elapsed since the deposition the defendants' current lawyers, whose energy and ability cannot be doubted, have failed to obtain any corroboration for Nellum's recantation.

We cannot of course determine the credibility of Nellum's recantation; we can only express our suspicions. These are germane, however, because an evidentiary hearing need not be granted on the basis of newly discovered evidence presented many years after the defendant's conviction became final unless there is a good reason to expect the hearing to result in an order for a new trial. We cannot find this proposition clearly articulated in any case, but it seems to us consistent with the results in the cases and sound as a matter of first principles. The circumstances of Nellum's recantation, the strength of the original evidence, and the fact that the core of his testimony was not recanted persuade us that the request for an evidentiary hearing was properly denied.

[17] We turn to the defendants' challenge to the sentencing hearing. They complain that their lawyers were not given enough time to obtain evidence of mitigating circumstances for submission to the jury at that hearing. They asked for a continuance immediately after the jury convicted their clients but it was denied. It was properly denied. In Illinois the jury that determines the defendant's guilt in a capital case also

determines whether he is to be sentenced to death, unless as in this case the defendant waives his right to be sentenced by the jury. Since it is the same jury, the sentencing hearing perforce follows immediately upon the trial, as it also does when the jury is waived. Defense lawyers know all this and therefore if they wish to gather evidence of mitigating circumstances they must do so before the trial ends, because they will have no time to do so after the trial ends. But in this case the defendants' lawyers dropped the ball and the defendants argue in the alternative that by doing so the lawyers failed to provide competent assistance of counsel at the sentencing hearing.

[18, 19] Perhaps so, but we need not decide this; for there was no prejudice, and without proof of prejudice a claim of ineffective assistance of counsel cannot succeed. The defendants' current lawyers have turned up no mitigating circumstances that might have been put before the jury with a fair chance of success. It is true that one of the *aggravating* circumstances, though limited to Bracy, is that shortly after participating in the triple murder in Chicago he participated in a double murder in Arizona. He had not yet been tried for those murders but the woman who was the wife and daughter of the murder victims and the state's main witness was brought to Chicago to testify in the sentencing hearing that Bracy was indeed one of the Arizona murderers. The defendants argue that their lawyers failed to present alibi evidence that might have persuaded the jury that Bracy had not committed those murders. We have little patience with this argument. Bracy was later convicted and sentenced to death for the Arizona murders, and the burden of proof that the state bore in convicting him was of course higher than it bore in the sentencing hearing, for the existence of an aggravating circumstance need only be proved by a preponderance of the evidence, provided that at least one such circumstance has been proved beyond a reasonable doubt, thus making the defendant eligible for the death sentence. 720 ILCS 5–8-1 (f); *Free v. Peters*, 12 F.3d 700, 703 (7th Cir.1993); *People v. Ramey*, 152 Ill.2d 41, 178 Ill.Dec. 19, 35–36, 604 N.E.2d 275, 291–92 (1992). So if all the evidence that had been before the Arizona jury had been presented to the jury in Chicago, the Chicago jury surely would have found that Bracy had committed the Arizona murders. Not all that evidence was presented, so maybe the jury would have been swayed by alibi evidence that we now know is false. But no principle of justice authorizes throwing out a sentence on the ground that the sentence might have been different had the defendant been allowed to present false testimony. *Lockhart v. Fretwell*, 506 U.S. 364, 369–71, 113 S.Ct. 838, 842–43, 122 L.Ed.2d 180 (1993); *Nix v. Whiteside*, 475 U.S. 157, 175–76, 106 S.Ct. 988, 998–99, 89 L.Ed.2d 123 (1986).

[20] Bracy objects to some remarks by the prosecutor at the closing argument at the sentencing hearing. The worst was, "Some of us went to Viet Nam and had to kill for this country, and I will be damned if anybody is going to tell me that what we did in Viet Nam or in any other war was a violation of the Fifth Commandment of the Bible." This was a response to defense counsel's argument that to sentence the defendants to death would violate the Ten Commandments, one of which of course is, "Thou shalt not kill." The prosecutor was pointing out, with unnecessary but not we think fatally prejudicial emphasis, that there is such a thing as justified homicide and that the execution of a duly convicted and sentenced murderer is, plausibly, an illustration of it.

Collins objects to the exclusion of a prospective juror on the basis of his acknowledging in response to a question by the judge that he would "probably" not consider imposing the death penalty. The defendants' lawyer did not object to excusing this prospective juror for cause. We do not think this was error, and certainly not error of constitutional proportions, given the absence of an objection. *Wainwright v. Witt*, 469 U.S. 412, 424–26, 429, 105 S.Ct. 844, 852–54, 855 83 L.Ed.2d 841 (1985).

The petitioners present other issues, but they either have too little merit to warrant discussion or they are foreclosed by previous decisions of this court that we are not given any reason to reexamine. We have considered the possibility that the cumulative effect

of the various irregularities alleged tips the balance in favor of a new trial or a new sentencing hearing but have concluded that it does not. We regret that Judge Maloney presided over the petitioners' trial but we do not think that the Constitution relieves them from the judgments that the Illinois courts have rendered.

AFFIRMED.

ILANA DIAMOND ROVNER, Circuit Judge, dissenting.

No right is more fundamental to the notion of a fair trial than the right to an impartial judge. *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, 1780, 29 L.Ed.2d 423 (1971) (per curiam); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). "The truth pronounced by Justinian more than a thousand years ago, that '[i]mpartiality is the life of justice,' is just as valid today as it was then." *United States v. Brown*, 539 F.2d 467, 469 (5th Cir.1976) (per curiam). The constitutions of our nation and of our states, the rules of evidence and of procedure, and 200 years of case law promise a full panoply of rights to the accused. But ultimately the guarantee of these rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.

The State of Illinois placed the fate of William Bracy and Roger Collins in the hands of a racketeer. Thomas Maloney is presently serving a prison term of nearly sixteen years for racketeering, conspiracy to commit racketeering, extortion under color of official right, and obstruction of justice. A jury determined that Maloney had accepted $10,000 in 1986 to acquit two El Rukn leaders of a double murder, an undetermined portion of a $100,000 payment in 1981 to acquit three New York gang members of murdering a rival in Chicago's Chinatown, and between $4,000 and $5,000 in 1982 to convict another individual of voluntary manslaughter rather than felony murder. These were but three of the bribes that witnesses attributed to Maloney at his trial. *See United States v. Maloney*, 71 F.3d 645 (7th Cir. 1995); Matt O'Connor, *Judge Maloney found guilty in corruption case*, CHICAGO TRIBUNE, April 17, 1993, News, at 1. At sentencing, Judge Leinenweber also found that Maloney had, while still a practicing lawyer, cooperated in procuring the notorious acquittal of reputed mob hitman Harry Aleman by Judge Frank Wilson in 1977. Mob enforcer Michael Bertucci testified that Maloney had helped him to evade a series of criminal charges by bribing judges as far back as the late 1960s, although Judge Leinenweber discounted this testimony. It would seem, in any event, that by the time Maloney ascended to the bench in 1977, he was well groomed in the art of judicial corruption, an art that he would practice at least until 1986, when he correctly perceived that he was under the watchful eye of the FBI and returned the $10,000 bribe he had accepted in the El Rukn prosecution.

Bracy and Collins were tried before Maloney in 1991, in the midst of Maloney's bribe taking. Maloney did not solicit a bribe from either defendant, nor did the defendants offer him one. Nor did the prosecution bribe Maloney. But given the abundant proof (and a federal jury's finding) that justice was for sale in Maloney's courtroom, we are compelled to consider whether Maloney may be deemed the impartial judge to which due process entitled these defendants.

I.

The petitioners argue that in cases that were not fixed, Maloney had an incentive to be particularly tough on defendants, in order to divert suspicion that might otherwise be aroused by the acquittals he was paid to render and to strengthen the incentive for defendants to bribe him. Without conceding that further evidence of Maloney's partiality was required to establish Maloney's constitutional inadequacy as a judge, the petitioners sought leave from the district court to engage in discovery, with the aim of establishing a pattern of corruption that affected Maloney's conduct in not only those cases in which he had accepted a bribe but also those in which he had not. Judge Hart denied their request, deeming what the petitioners sought to prove to be a matter of speculation and, in any event, insufficient to establish a constitutional deprivation. *United States ex rel. Collins v. Welborn*, 868 F.Supp. 950, 991 (N.D.Ill.1994). Like my colleagues in the majority, the district judge concluded that the most the circumstances permitted Bracy and Collins to argue was the mere possibility of bias, which *Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363 (7th Cir.1994) (en banc), *cert. denied*, — U.S. —, 115 S.Ct. 1404, 131 L.Ed.2d 290 (1995), indicates is not enough to establish a deprivation of due process. 868 F.Supp. at 991.

In fact, the notion that Maloney was deliberately tough on defendants who did not bribe him finds support in the testimony presented at Maloney's trial. Defense attorney William Swano arranged several of the bribes for which Maloney was prosecuted and was a key government witness against him. In 1985, Swano represented James Davis, whom the state had charged with armed robbery. The case was assigned to Maloney for trial. By this time, Swano had already bribed Maloney on a number of occasions. But after investigating the prosecution's case against Davis, Swano concluded that it would be unnecessary to bribe Maloney in order to obtain an acquittal in this case: three witnesses to the robbery knew the two perpetrators and said that Davis was not one of them; Davis had an alibi; and the victim of the crime, who had initially identified Davis as one of the perpetrators, had confessed uncertainty about the identification. Swano was confident that "[t]he case was a not guilty in any courtroom in the building." *United States v. Thomas J. Maloney and Robert McGee*, No. 91 CR 477, 1994 WL 96673 Tr. 2528 (N.D.Ill. March 24, 1993). To Swano's surprise, however, Maloney convicted his client after a bench trial. Swano took this as a lesson that "to practice in front of Judge Maloney . . . we had to pay." Tr. 2530. That Swano had correctly interpreted this conviction as a lesson was arguably confirmed by Maloney's bagman, Robert McGee. Swano met with McGee soon after Davis was convicted to discuss a fix in the double murder trial of the two El Rukns. Swano had persuaded his client that bribing Maloney was the prudent course, explaining that he had only lost one case before Maloney, "and that was the one that we didn't work," i.e., fix. Tr. 2544; *see also* Tr. 2559. In arranging the meeting with McGee, Swano had told him that he wanted to discuss "a hot case in front of Judge Maloney". Tr. 2566. McGee said that he would first have to obtain Maloney's permission. Tr. 2567. When Swano and McGee subsequently met at Le Bourdeux, a local watering hole, McGee told Swano that he had gotten the okay from Maloney to speak about the matter. Swano recalled: "He told me that the judge had said we could talk, especially in view of the way the judge had screwed me on the last case," which Swano understood to be a reference to the Davis case. Tr. 2567–68. Swano voiced agreement with the assessment "that the judge had screwed me on the case and had screwed my client." Tr. 2568. He and McGee then got down to details about the El Rukn fix. That bribe was one of four that the jury later found Maloney guilty of accepting.

One may infer from Swano's testimony that Maloney saw the Davis prosecution, in which no bribe was tendered, as an opportunity to teach Swano a lesson that would ensure bribes in future cases. That, at least, was the moral of the story for Swano. If Swano was right (a matter for the factfinder, not us, to determine), then it would seem that Maloney's approach to case fixing was indeed the global view that Bracy and Collins posit: fixed cases were a source of illicit profit, whereas unfixed cases were an opportunity, as Bracy puts it, to "advertise" in the defense bar (Bracy Reply at 1) while at the same time protecting his franchise by currying favor with law and order minded voters and avoiding the ire of the law enforcement community. Like my colleagues, I think that the petitioners face an exceedingly difficult task in attempting to unearth evidence that will lend further support to their theory (*see ante* at 691), but Swano's testimony suggests that the search may not be futile.

At bottom, my colleagues believe that Bracy and Collins are not entitled to discovery because the most they can hope to prove is

that Maloney made it a practice to lean over backwards in favor of the prosecution in cases in which he was not bribed; without proof that he followed that practice in *this* case, they reason, Bracy and Collins have no claim. *Ante* at 691. But when the trial judge is tainted by a pervasive conflict of interest—in other words, one not limited to a particular litigant or type of case-evidence that the taint had a discernible effect on a given case is unnecessary. Here the showing that my colleagues require would be all but impossible to make, absent either an extraordinary admission from Maloney, which is not forthcoming (Maloney continues to proclaim his innocence) or the kind of over-the-top courtroom behavior that makes a judge's partiality plain (*see, e.g., United States v. Dellinger*, 472 F.2d 340, 396–88 (7th Cir.1972), *cert. denied*, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973)), a rare phenomenon not evident from the record here. In any event, the Supreme Court has expressly rejected the idea that such proof is mandated, finding that it "requires too much and protects too little." *Ward*, 409 U.S. at 61, 93 S.Ct. at 83; *see also Aetna*, 475 U.S. at 830–31, 106 S.Ct. at 1590 (Brennan, J., concurring); *id.* at 831–33, 106 S.Ct. at 1590–91 (Blackmun, J., concurring). To establish a deprivation of due process, the petitioners need only show that the circumstances "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Tumey*, 273 U.S. at 532, 47 S.Ct. at 444; *accord Aetna*, 475 U.S. at 822, 106 S.Ct. at 1585; *Ward*, 409 U.S. at 60, 93 S.Ct. at 83; *Del Vecchio*, 31 F.3d at 1372, 1373. Proof that Maloney was motivated by virtue of his bribe taking to favor the prosecution and disfavor the defense in unfixed cases would permit, if not compel, the inference that Maloney's adverse rulings against Bracy and Collins were animated by a pernicious intent on Maloney's part (*see* Fed. R.Evid. 404(b)) and would more than satisfy the standard the Supreme Court has enunciated.

Habeas Rule 6(a) requires only that the petitioner demonstrate "good cause" to engage in discovery, and Bracy and Collins have certainly done so here. In view of the jury's verdict against Maloney, it is undisputed that he was accepting bribes at the very time that Bracy and Collins came to trial. Although there is no suggestion that money oiled the wheels of justice in this case, my colleagues concede the plausibility of the notion that "a judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes." *Ante* at 689. Putting aside for the moment contamination of the judge's philosophy, it seems to me likely that any judge who accepts bribes and wishes to remain on the bench will think in strategic terms about his other cases. As Chief Judge Posner points out, one might wonder whether it would really have been in Maloney's interest to assume a pro-prosecution mantle in unfixed cases, lest the occasional acquittal purchased from him look out of character. *Ante* at 689–90. But the time for such deliberation is after an evidentiary hearing on the matter, when the petitioners have had the opportunity to find and present whatever evidence there may be to establish any practice Maloney may have followed. Swano's testimony provides some evidence in that regard, and there may be more. Without giving Bracy and Collins the opportunity to present that evidence to Judge Hart, their claim of conflict can only be resolved on the basis of speculation, as my colleagues agree. *Ante* at 690. In view of the grave and structural nature of the petitioners' claim, not to mention the fact that this is a capital case, which "magnifies the appearance of impropriety," (*ante* at 689), the petitioners are entitled to more from us.

My colleagues note that Bracy and Collins have long had access to some of the information that they profess an interest in exploring—the records of other trials over which Maloney presided, and the record of Maloney's own trial, for example—but have not pointed to anything that bolsters their claim of partiality. *Ante* at 691. But if petitioners can be faulted for not making the most of the available material, we can be faulted for being naive about what the cold page of a trial record will reveal. A judge who wishes to be tough on the defendant need not adopt the manner of the Tasmanian Devil to do it. Maloney was by no account stupid. When he sold an acquittal, he wanted facts that he could hang his hat on (*e.g.*, Maloney Tr. 2571, 2669–70, 2682); and we have no reason to doubt that if he wanted to cultivate a pro-prosecution record to protect his interests as a bribe taker, he had the ability to do so discretely, without appearing to have abused his discretion as a trial judge. Cases are fixed not in the courtroom but in bars, bathrooms, and back hallways. If there is evidence of the kind Bracy and Collins hope to find, it is in the hands of persons familiar with these venues of injustice. Both Maloney and his bagman McGee are continuing their version of "stand[ing] tall" (*see United States v. Maloney*, 71 F.3d at 651–52), but Swano, Robert Cooley, and others may have something material to say, and the U.S. Attorney may be of some help in identifying whom the petitioners should approach. But it is likely that no one is going to talk without a subpoena, and petitioners should not be deprived of that instrument.

We are venturing into a realm noir with which, I may say with confidence, none of us is on intimate terms. We cannot simply assume that "the probability is slight" that discovery will yield Bracy and Collins anything. *Ante* at 691. Let them try. If their discovery proves fruitless, we can at least take comfort in the knowledge that we have given them every opportunity to prove that Maloney's corruption deprived them of a fair trial. We cannot, after all, have it both ways: we cannot criticize Bracy and Collins for speculation and at the same time deprive them of the chance to render their theory anything more. I understand that Illinois has an interest in the finality of its judgments, and allowing the discovery that the petitioners seek would, if nothing else, portend a significant delay in the implementation of their death sentences. But having left Bracy and Collins to the mercies of a corrupt judge, the State should not be heard to complain in this matter. (In fact, its brief is utterly silent on this point.) The people of Illinois have as great an interest in the integrity of capital trials as Bracy and Collins do.

II.

My disagreement with the majority goes deeper than the question of discovery, however. In the end, I agree with Collins and Bracy that proof of the impact Maloney's corruption had, or probably had, on the petitioner's trial is unnecessary. We do not know, and we likely will never know, what Maloney thought about Bracy and Collins. But we have a pretty clear picture of how he viewed justice. The price tag may have varied, but as Maloney's conviction proves, justice was for sale in Maloney's courtroom to the defendants who could afford to pay, even when they were charged with the most heinous of crimes. That fact carries far more significance than the majority is willing to recognize. As this court acknowledged in *Del Vecchio*, in considering whether a biasing influence requires the disqualification of a judge, "we begin . . . by presuming 'the honesty and integrity of those serving as adjudicators.'" 31 F.3d at 1375 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975)). That presumption, as my colleagues acknowledge, is "obviously inapplicable here." *Ante* at 688. Maloney was not Louis Garippo, an esteemed and honest judge whose impartiality was argued to have been potentially compromised by his prior involvement with the defendant as a prosecutor. *See Del Vecchio*, 31 F.3d at 1375–80 (majority); *id.* at 1398 (Cummings, J., dissenting); *id.* at 1399 (Cudahy, J., dissenting); *id.* (Ripple, J., dissenting). Nor was he even Otto Kerner, a judge whose crimes pre-dated his service on the bench. *See United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183,41 L.Ed.2d 1146 and *cert. denied*, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974). Maloney was a criminal who, as a judge, transformed his very office into a racketeering enterprise.

Faced with the possibility of vacating numerous convictions obtained in Maloney's courtroom, we would like to believe that he was capable of the impartiality that the Fourteenth Amendment requires when no money changed hands. But how can we? Once he embarked on the path of bribe taking, Maloney had forsaken his judicial oath.

Justice was a mere commodity to him, defendants nothing more than a profit center. His deviation from the path of righteousness was not, moreover, momentary and uncharacteristic; it was cold, calculated, and spanned a period of years, if not the entirety of his tenure on the bench. Thus, Maloney's "bias," if we can call it that, cannot be conveniently compartmentalized. *Cf. Diversified Numismatics, Inc. v. City of Orlando, Florida*, 949 F.2d 382, 385 (11th Cir.1991) (per curiam). We may no more treat Maloney as an impartial arbiter for constitutional purposes than a delusional megalomaniac who locks a judge in the closet, dons a black robe, and hoodwinks everyone with a credible impersonation of Oliver Wendell Holmes. Maloney's willingness to exchange money for the freedom of those charged with the most abhorrent crimes displayed his scorn for the very concept of justice.

By demanding proof that Maloney's corruption either had or likely had an identifiable impact on the petitioners' trial, we fail to come to grips both with the gravity of Maloney's offense and with the constitutional imperative that the accused be tried before a judge of integrity and impartiality. "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.'" Aetna, 475 U.S. at 825, 106 S. Ct at 1587 (quoting *Murchison*, 349 U.S. at 136, 75 S.Ct. at 625). We said in *Del Vecchio* that "bad appearances alone [do not] require disqualification" (31 F.3d at 1372), but that an external influence requires the judge's disqualification when "the influence[ ] involved str[ikes] at the heart of human motivation, that an average man would find it difficult, if not impossible, to set the influence aside" (*id.* at 1373). My colleagues and I have been discussing Maloney's bribetaking as just another "bias" or "influence," something external to his personality, or at least some severable part of it, that at most "might" have given him the "incentive" to behave in a particular fashion on occasions when he was not bribed. But there is a more malevolent side to Maloney's offense that cannot be ignored. Maloney's bribetaking removes him from the category of the "average" man we addressed in *Del Vecchio*. We are speaking in this case about what motivates a *criminal*, and this implicates a far darker set of impulses than we confront in the usual bias case. The question we should be asking ourselves is not what impact the lack of a bribe had on Maloney's decisionmaking in a particular case, but what his willingness to accept a bribe tells us about his view of judging. Maloney proved himself willing to acquit defendants charged with capital offenses for a few thousand dollars. The victims of those crimes, their families, the people of Illinois, the concept of justice, were apparently worth no more to him. Why should we assume that defendants were worth anything more to Maloney? How, in particular, can we trust Maloney to have treated a defendant fairly when that defendant had not offered him any money?[1] If due process means anything, I think we must assume that Maloney's corruption pervaded his work as a judge. The Supreme Court could not have put it more clearly: "[W]hen the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired." *Vasquez v. Hillery*, 474 U.S. 254, 263, 106 S.Ct. 617, 623, 88 L.Ed.2d 598 (1986).[2]

1. Consider the words of a government attorney who prosecuted Maloney:

> As a judge [Maloney] was tough and hard-nosed. Many prosecutors liked working in his courtroom because he was tough and hard-nosed. But one of the things that I have heard over and over again from lawyers in the community is that he took it far too far; that he was ruthless; that he heartlessly meted out sentences without any compassion. [T]he only time there was compassion that we can see has to do with the times in which money was being passed.

United States v. Thomas J. Maloney and Robert McGee, No. 91 CR 477, Sentencing Tr. 559–60 (N.D.Ill. July 21, 1994) (remarks of Assistant United States Attorney Scott Mendeloff).

2. I recognize, of course, that there are prosecution-minded judges and defense-minded judges and that although these predispositions can have a very real impact on the kind of trial the parties receive, we ordinarily do not recognize this bias as a constitutional deprivation. *See ante* at 688; *see also Del Vecchio*, 31 F.3d at 1390–91 (Easterbrook, J., concurring). Judges are, after all, human beings, and we dare not fool ourselves into thinking that any judge can completely divorce herself from her own experiences and predilections. *Id.* at 1372 (majority); *see also* Benjamin N. Cardozo, The *Nature of the Judicial Process* 168–69 (Yale Univ. Press 1921). But the distinction between the honest judge, who labors to varying degrees of success to rise above his prejudices, and the dishonest judge, who willingly abandons his oath and yields to the coarsest of proclivities, cannot be overstated. We simply have no business assuming that a judge who is willing to acquit an accused murderer for a few thousand dollars will make any effort to protect the rights of a defendant who has not greased his palm.

Although Maloney's crimes reveal no fealty to his oath as a judge, my colleagues nonetheless refuse to relinquish the presumption that he acted fairly when not bribed. The notion that "a judge who accepts bribes in some cases is corrupt in all" is not "a sufficiently compelling empirical proposition," they say, to treat this case as if the government had bribed Maloney to convict the petitioners. *Ante* at 690. But this is not an empirical matter. We cannot assign a value of x to a judge's ability to be fair, divide it by y (y representing Maloney's bribe taking), and determine whether the result is less than the constitutionally minimal level of impartiality, z. Like so many other elements of our democracy, justice requires a leap of faith: faith that the defendant is in fact presumed innocent until proven guilty beyond a reasonable doubt; faith that the prosecutor and defense counsel alike will act as zealous advocates for their principals within the confines of law and ethics; faith that the trial judge will favor no party but will strive "to hold the balance nice, clear, and true between the state and the accused." *Tumey*, 273 U.S. at 532, 47 S.Ct. at 444. Maloney's crimes shatter that faith. We have no reason to believe that had Bracy and Collins possessed sufficient funds and willing attorneys, they could not have bought acquittals from Maloney. That alone suggests that Maloney's was not the court of "law" to which Bracy and Collins were entitled as the forum for their trial. We do have reason, based on Swano's testimony, to believe that Maloney's corruption extended beyond the cases in which he accepted a bribe, and that Maloney saw unfixed cases as an opportunity to "screw" the defendant and thereby further his own ends as a bribe taker. No "empirical" proof is necessary to demonstrate that the petitioners did not stand equal before the law in Maloney's courtroom.

I realize, of course, that Bracy and Collins were convicted by a jury, not by Maloney. Jurors have minds of their own; they can and do defy the expectations of the judge. That is but one reason that the jury has been viewed by some as "the very palladium of free government." *The Federalist* No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed. 1961); *see Duncan v. Louisiana*, 391 U.S. 145, 155–58, 88 S.Ct. 1444, 1451–52, 20 L.Ed.2d 491 (1968). But we cannot ignore the influence that the judge retains even in a jury trial. *See Walker v. Lockhart*, 726 F.2d 1238, 1259 (8th Cir.1984) (en banc) (Bright, J., dissenting), *cert. dismissed*, 468 U.S. 1222, 105 S.Ct. 17, 82 L.Ed.2d 912 (1984), and *cert. denied*, 478 U.S. 1020, 106 S.Ct. 3332, 92 L.Ed.2d 738 (1986). I do not refer so much to the ability of the judge to communicate his opinions to the jury through raised eyebrows, choice bits of sarcasm, and questioning of the witnesses that strays into advocacy, although this happens. *E.g., Dellinger*, 472 F.2d at 386–88; *see also United States v. Filani*, 74 F.3d 378, 387 (2d Cir.1996); *Bufford v. Rowan Cos.*, 994 F.2d 155, 159 (5th Cir.1993). I mean the extraordinary ability of the trial judge to shape the trial itself. It is she who decides what evidence the jury may hear, how counsel may behave in front of the jury, what arguments may be made, how they may be made, what legal principles the jury must apply, and even, to a significant degree, who will sit on the jury. Thus, even when the verdict is not entrusted to her, a partial judge retains great influence, if not directly upon the jury, then upon the myriad events that culminate in the jury's decision. *See Tyson v. Trigg*, 50 F.3d 436, 439 (7th Cir. 1995), *cert. denied*, — U.S. —, 116 S.Ct. 697, 133 L.Ed.2d 655 (1996).[3]

Our own ability to monitor the influence of the trial judge, and to discern the taint of

3. In this case there were plenty of issues that implicated Judge Maloney's discretion and thus his ability to influence the case against Bracy and Collins: the credibility questions presented by the petitioners' motion to suppress key evidence; the bolstering of prosecution witnesses; the collateral impeachment of defense witnesses;

1995) (Ripple, J., concurring), *supplemented on reh'g*, 70 F.3d 955, *petition for cert. filed* (Jan. 16, 1996) (No. 95–7444). The state has never cited *Teague* as a defense to the petitioners' claim of judicial corruption, and I am not convinced that the circumstances of this case warrant our sua sponte reliance upon it as an alternate basis for denying the petitioners the relief they seek. *See Stewart* at 304 (concurrence) ("Because, in a capital case, invocation of *Teague* can often mean the difference between life and death for the petitioner, we need to be particularly circumspect as to when we shall invoke *Teague* sua sponte."). The majority offers no reason why *Teague* is particularly apposite here, and I discern none. Since when is it news that the accused has the right to be tried before an honest, impartial judge? I had rather thought that to be a cornerstone of our system of justice. And indeed, Supreme Court precedent reveals the notion to be anything but novel. The Court's 1927 decision in *Tumey*, for example, holds that when a judge has a financial incentive to see the defendant convicted, he is not sufficiently impartial for constitutional purposes. 273 U.S. at 531–35, 47 S.Ct. at 444–45. This case is, in a real sense, but a factual variant of *Tumey*. I grant that no court has yet found it necessary to hold that a judge engaged in serial bribetaking is not the impartial a[judicator that the Constitution requires, and in that respect one might argue that the rule the petitioners posit "was not *dictated* by precedent existing at the time [their] conviction[s] became final." *Caspari v. Bohlen*, — U.S. —, —, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070) (emphasis in *Teague*). But surely common sense counts for something in the *Teague* analysis. The Greylord prosecutions had not yet taken place in 1981 when Bracy and Collins were tried, but the State of Illinois cannot claim to have been ignorant of the notion that bribery is illegal and that judges who accept bribes belong in prison, not on the bench. There is, in short, nothing surprising in the petitioners' claim. The prospect of retrying Bracy and Collins (not to mention other defendants convicted by or before Maloney) is an onerous one for the State, but that burden has nothing to do with the novelty of the principle that a defendant is entitled to a judge who is not on the take. Our invocation of *Teague* in this circumstance makes that precedent look less like a shield protecting the State from the retroactive application of new rules than a sword depriving habeas petitioners of constitutional rights that have long been recognized.

5.

Eighteen judges of the Cook County Circuit Court have been convicted of corruption in the last decade. We would like to think that rampant corruption on the Cook County bench is a relic of the past. But it will not be, it cannot be, so long as we refuse to recognize just how fundamentally at odds this corruption is with the constitutional guarantee of due process. Like Terrence Hake, who risked his own career to expose the criminals clothed in the robes of judges, we too have a role to play in restoring integrity to the bench. We cannot embrace the judicial services of outlaws without deepening the stain their crimes have already left on our courts.

I respectfully dissent.

Sandra BAREFIELD, Eddie Benoit, Dave W. Bennett, et al., Plaintiffs–Appellants,

v.

VILLAGE OF WINNETKA, an Illinois municipal corporation, Defendant–Appellee.

No. 95–3301.

United States Court of Appeals, Seventh Circuit.

Argued Feb. 8, 1996.

Decided April 15, 1996.

Rehearing Denied May 28, 1996.

Police officers and civilian dispatchers brought state court action against village seeking overtime pay, under terms of employee manual and under Fair Labor Standards Act (FLSA), for time spent in roll call prior to their shifts. Village removed action to federal court. The United States District Court for the Northern District of Illinois, James B. Zagel, J., entered summary judgment for village. Officers and civilian dispatchers appealed. The Court of Appeals, Eschbach, Circuit Judge, held that: (1) officers and civilian dispatchers had no contractual right to overtime pay for attending roll call; (2) village qualified for FLSA overtime exemption applicable to agencies that have established work period of seven to 28 days for law enforcement employees, even though village's 28–day schedule predated enactment of statute containing exemption; and (3) village was not required by FLSA to pay overtime to civilian employees for 15–minute periods spent in roll call prior to beginning of their shifts, since village could offset their paid meal time against time spent in roll call.

Affirmed.

1. Federal Courts ⇐776

Court of Appeals would review de novo the district court's rulings on cross motions for summary judgment, resolving all reasonable inferences in favor of nonmoving party. Fed.Rules Civ.Proc.Rule 56, 28 U.S.C.A.

2. Municipal Corporations ⇐220(4)

Under Illinois law, for village employees to prevail on claim that they had contractual right to compensation for time spent at roll call prior to beginning of their shifts, they were required to establish that employment manual created enforceable contract and that this contract mandated right to payment for time spent in roll call.

3. Master and Servant ⇐2.1

Under Illinois law, for employee policy statement to be contract enforceable against employer, first, language of statement must contain promise clear enough that employee would reasonably believe that offer has been made, second, statement must be disseminated to employee in such manner that employee is aware of its contents and reasonably believes it to be offer, and, third, employee must accept offer by commencing or continuing to work after learning of statement.

4. Contracts ⇐29

Under Illinois law, whether contract exists is question of law.

5. Master and Servant ⇐4

Under Illinois law, test established in *Duldulao v. St. Mary of Nazareth Hospital*, for determining whether employee policy document is contract enforceable against employer, determines whether implied-in-fact contract exists.

6. Contracts ⇐27

Under Illinois law, implied-in-fact c tract requires meeting of the minds.

7. Contracts ⇐27

Under Illinois law, implied contract arises where intention of parties is not expressed, but agreement in fact creating obligation is implied or presumed from their acts, or in other words, where circumstances under common understanding show mutual intent to contract.

8. Contracts ⇐27

Under Illinois law, contract implied in fact must contain all elements of express contract, and there must be meeting of the minds.

9. Municipal Corporations ⇐186(5)

Under Illinois law, police officers and civilian dispatchers had no contractual right pursuant to employee manual to overtim pay for attending 15–minute roll call prior their shifts; manual stated that only 30 minutes or more beyond regular hours would be considered overtime, and, even assuming that manual created enforceable contract, any such contract was formed on the premise that roll call would not be paid activity.

10. Labor Relations ⇐1511.1

Public agency bears burden of establishing that it qualifies for Fair Labor Standards Act (FLSA) overtime exemption applicable to agencies that have established work period that lasts from seven to 28 days for employees engaged in law enforcement or fire protection activities. Fair Labor Standards Act of 1938, § 7(k), 29 U.S.C.A. § 207(k).

[10] Plaintiff has demonstrated issues of fact sufficient to preclude summary judgment on her second retaliation claim with respect to some of her other allegations of adverse employment actions, however. Specifically, plaintiff offered evidence that her desk was searched at work and that property was removed from it. Plaintiff also alleges that she was subjected to numerous ad hoc meetings concerning her PPR and work performance and that false information and open door policy information was put in her shield. Further, there is a material issue of fact as to whether or not plaintiff was intimidated or coerced in an effort to have her sign inaccurate statements about her work performance at these meetings. Defendant has not offered legitimate and nondiscriminatory reasons for such actions, provided that plaintiff can establish they occurred.[12]

IV. ***Summary.*** Defendant's motion to dismiss some of plaintiff's claims for failure to exhaust administrative remedies and to comply with statutes of limitation is denied. Plaintiff's claim of malicious harassment is dismissed for failure to state a claim. Plaintiff has produced no probative evidence creating issues of fact as to whether or not defendant discriminated against her on the basis of age by not granting her requests for promotions. Plaintiff has introduced no probative evidence of age discrimination in relation to any other allegedly adverse employment actions on the part of defendant. Accordingly, defendant's motion for summary judgment on plaintiff's age discrimination claims is granted in full. Plaintiff has, on the other hand, demonstrated the existence of sufficient issues of fact precluding a grant of summary judgment on all her retaliation claims.

Accordingly, defendant's motion for summary judgment is granted in part and denied in part.

IT IS SO ORDERED.

12. Instead of attempting to articulate legitimate reasons for these actions, defendant asserts that these allegations do not constitute adverse employment action. Contrary to defendant's position, these alleged actions obviously concern the terms and conditions of plaintiff's employment.

UNITED STATES ex rel. Roger COLLINS, Petitioner,

v.

George WELBORN, Warden, Menard Correctional Center, Respondent.

UNITED STATES ex rel. William BRACY, Petitioner,

v.

Richard GRAMLEY, Warden, Pontiac Correctional Center, Respondent.

Nos. 93 C 5282, 93 C 5328.

United States District Court, N.D. Illinois, Eastern Division.

Aug. 24, 1994.

Opinion Denying Motions to Alter or Amend Nov. 4, 1994.

Defendants' armed robbery, aggravated kidnapping, and murder convictions were affirmed, 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267, by the Illinois Supreme Court. The trial court's denial of postconviction relief was also affirmed, 606 N.E.2d 1137. Defendants sought federal habeas corpus relief. On motion to deny defendants' petitions, the District Court, Hart, J., held that: (1) Illinois statute providing that death sentence is subject to automatic review did not excuse defendants' procedural default of claims alleging fundamental error; (2) defendants could not conduct discovery as to alleged accomplice's recantation of trial testimony; (3) prosecutors did not engage in misconduct warranting relief; (4) evidence was sufficient to sustain convictions; (5) discovery as to alleged bias of wife of judge who had previously sentenced one defendant was not warranted; (6) refusal of continuance prior to sentencing phase was not erroneous; and, on

motion to alter or amend judgment and for approval of expenditure of funds to conduct further discovery; (7) district court's failure to review trial exhibits with transcript did not undermine finding that convictions were sustained by sufficient evidence; and (8) defendant was not entitled to funds for conducting further discovery.

Petitions dismissed; motions to amend or alter judgment denied.

1. Habeas Corpus ⇐380.1

District court may ordinarily only consider habeas corpus claims of state prisoners if those claims have, without procedural default, first been fairly presented to state's highest court.

2. Habeas Corpus ⇐401, 404

Procedural default will not preclude consideration of state prisoner's habeas corpus claim if cause for default and actual prejudice is shown or if failure to consider claim would be fundamental miscarriage of justice.

3. Habeas Corpus ⇐406

Constitutionally ineffective assistance of counsel can constitute cause for procedural default which allows district court to hear habeas corpus claim, but ineffective assistance of counsel claim cannot be used as cause unless claim has first been presented as independent claim in state court. U.S.C.A. Const.Amend. 6.

4. Habeas Corpus ⇐406

Ineffective assistance of postconviction counsel cannot constitute cause excusing procedural default, even if postconviction proceedings are first opportunity that claim may be raised, as there is no constitutional right to counsel on postconviction review. U.S.C.A. Const.Amend. 6.

5. Habeas Corpus ⇐406

If issue was procedurally defaulted for postconviction review because not preserved by trial counsel or counsel presenting direct appeal, ineffective assistance of trial or appellate counsel can constitute cause excusing procedural default. U.S.C.A. Const.Amend. 6.

6. Habeas Corpus ⇐405.1

Habeas corpus petitioners' claim that denial of constitutionally guaranteed access to courts constituted cause excusing procedural default of certain claims would not be considered absent allegations as to what legal resources were unavailable where petitioners were incarcerated.

7. Prisons ⇐4(13)

Lack of legal resources at prison generally will not constitute unconstitutional interference with access to courts where prisoner also has assistance of counsel. U.S.C.A. Const.Amend. 6.

8. Criminal Law ⇐1134(3)
Habeas Corpus ⇐385

Illinois statute providing that death sentence is subject to automatic review by Supreme Court did not preclude finding that certain claims of fundamental error have been waived; Supreme Court was not required to decide all possible issues that could be raised on direct review of capital case and Court would not be presumed to have decided issues that were not presented to or discussed by that Court. S.H.A. 720 ILCS 5/9-1(i).

9. Criminal Law ⇐1028, 1063(1)

Under Illinois law, to preserve issue for appeal from criminal conviction, even in capital cases, issue generally must be raised at trial and also presented in motion for new trial pursuant to statute. S.H.A. 725 ILCS 5/116–1.

10. Habeas Corpus ⇐403

If state procedural bar of particular issue is not applied with regularity and consistency, it will not preclude raising issue in federal habeas corpus petition.

11. Habeas Corpus ⇐453

Errors of state law are not basis for granting federal habeas corpus relief.

12. Habeas Corpus ⇐453

Allegedly incorrect application of state law does not become basis for habeas corpus relief simply by recharacterizing it as equal protection violation because some defendants

have different law applied to them. U.S.C.A. Const.Amend. 14.

13. Habeas Corpus ⇐403

Allegedly inconsistent behavior of state Supreme Court in failing to find that prosecutor's closing remarks constituted plain error even though no contemporaneous objection was made did not excuse procedural bar to habeas corpus petitioner's claims based on remarks, despite fact that prosecutorial remarks were found to be plain error without contemporaneous objection in one other case, where remarks made in other case were different than in instant case.

14. Courts ⇐100(1)

Supreme Court's *Batson* decision dealing with discrimination in state's use of peremptory challenges did not apply in instant case, as *Batson* was decided after direct review in instant case had been completed.

15. Habeas Corpus ⇐380.1, 382

Failure to fairly present claim to state court, including fairly presenting operative facts, constitutes procedural default barring presentation of claim on federal habeas review.

16. Habeas Corpus ⇐407

Discovery of new evidence may, under certain circumstances, constitute cause excusing habeas corpus petitioner's failure to raise particular issue before state courts.

17. Criminal Law ⇐998(14.1)

Under Illinois law, delay in filing postconviction petition will be excused if it was not due to defendant's culpable negligence. S.H.A. 725 ILCS 5/122–1.

18. Habeas Corpus ⇐431

Absent showing by state that state courts would excuse habeas petitioners' delay in raising issue of witness's recantation in postconviction petition, on grounds of new evidence, district court would presume that no remedy was still available in state court at time new evidence was discovered.

19. Habeas Corpus ⇐491

Introduction of perjured testimony at trial is not, by itself, constitutional violation that will support granting of habeas corpus relief; there is only constitutional violation if prosecution knowingly used perjured testimony.

20. Habeas Corpus ⇐491

Alleged accomplice's purported recantation of testimony did not support conclusion that state knowingly used perjured testimony, such that habeas relief was warranted, as recantation was not substantially different from trial testimony but merely tended to impeach accomplice's credibility.

21. Habeas Corpus ⇐688

Good cause for conducting discovery as to witness's purported recantation of testimony did not exist, upon habeas corpus petition, where investigator for one defendant had spent 25 hours talking to witness, witness's sworn statement was taken, and deposition was partially taken without developing substantial recantation. Rules Governing § 2254 Cases, Rule 6(a), 28 U.S.C.A. foll. § 2254.

22. Habeas Corpus ⇐383

Habeas petitioners' claims that prosecutorial misconduct violated Federal Constitution were not waived because of failure to fairly present claims to state Supreme Court; although petitioners cited only state cases to support prosecutorial misconduct claim before state court, claim was in mainstream of federal constitutional litigation and references to due process and right to fair trial were sufficient to inform state Supreme Court that claims were constitutionally based. U.S.C.A. Const.Amends. 5, 6, 14.

23. Criminal Law ⇐1134(2), 1137(8)

In determining whether prosecutorial misconduct is so prejudicial as to deprive defendant of fair trial, court considers whether misconduct was invited by conduct of defense counsel, whether objections were sustained, and whether any corrective or related instructions were given.

24. Criminal Law ⇐338(7)

Evidence that witness is in protective custody may be relevant, but should be used cautiously.

25. Habeas Corpus ⇐497

State's reference to fact that two witnesses were in protective custody did not warrant habeas corpus relief, although state's expanding upon information elicited by defense as to benefits witnesses received from government was improper; state did not dwell on fact that witnesses were provided with protection, so references did not deprive petitioners of fair trial.

26. Habeas Corpus ⇐490(1)

Errors regarding admissibility of evidence are generally matter of state law that are insufficient basis for granting habeas corpus relief; to support granting of habeas relief, evidentiary ruling must implicate specific constitutional right or evidence's undue prejudice so greatly outweigh its probative value and likely affect trial outcome that defendant was denied fundamentally fair trial.

27. Criminal Law ⇐706(3)

State's impeachment of alibi witness as to what movie she saw with murder defendant and whether witness was heroin addict then on methadone was not prosecutorial misconduct depriving defendant of fair trial; witness's recall of events occurring on day before murder and witness's addiction to narcotics could be relevant to credibility such that impeachment was not excludable as collateral.

28. Criminal Law ⇐706(3)

State's particularized questioning of alibi witness in connection with impeaching witness about her drug addiction, as to witness's injecting heroin into her arms with needles, did not add such undue prejudice to addiction questioning that defendant was deprived of fair trial.

29. Criminal Law ⇐730(3)

State's questioning of defense witness about nose-ring worn by witness, which was improper and exhibited lack of professionalism, did not deprive defendant of fair trial, where only one question was asked and it was immediately ordered to be stricken.

30. Habeas Corpus ⇐495

Impeachment of defense witness regarding her alleged attempt to obtain public aid in two states was not basis for granting habeas corpus relief, as prejudice was minimal where witness was also impeached on basis of convictions for three counts of robbery and one of misdemeanor theft.

31. Habeas Corpus ⇐341

Habeas petitioner waived argument that state, in its closing argument, improperly sought to link petitioner with crimes committed by codefendant in different state, where issue was never raised in state courts and no argument in support of it was made in response to state's motion to dismiss habeas petition.

32. Criminal Law ⇐720(2)

State's misstatement in closing argument that no prosecution witness had been asked about individual who defendants claimed was participant in crime, where one witness had been asked about that individual, did not unconstitutionally prejudice defendants; whether witness was asked about individual was not key fact, especially since witness denied having any knowledge of individual.

33. Habeas Corpus ⇐497

State prosecutor's discussion of reasonable doubt during closing argument was not unconstitutional misstatement of government's burden of proof warranting habeas corpus relief, even though argument was not definition of reasonable doubt contained in jury instructions. U.S.C.A. Const.Amends. 5, 14.

34. Criminal Law ⇐719(1)

Prosecutor's reference, in closing argument, to facts not in record is improper.

35. Habeas Corpus ⇐497

Prosecutor's vouching for state's witnesses or for evidence is not sufficient to warrant habeas relief; relief will not be granted unless remarks are so inflammatory and prejudicial that trial is unfair and unless statements likely changed outcome of trial.

APPENDIX C

36. Criminal Law ⇐720(1)

Prosecutor's closing argument that he would not jeopardize his license by suborning perjury was unnecessary and improper, but was not so inflammatory and prejudicial as to deny habeas petitioners fair trial, in light of defense counsel's argument implying that prosecutors knowingly solicited perjured testimony from their colleagues.

37. Constitutional Law ⇐268(8)

Criminal Law ⇐719(1, 3), 723(1)

Neither prosecutor's remarks in closing argument referring to witness's statement that was not before jury, and to voir dire outside jury's presence, nor putting forth theory that it was defense attorneys' duty to defend guilty killers and that they sought to lie to, mock, and demean jury, nor statement that prosecutors would not be prosecuting case or presenting certain evidence if they did not personally believe defendants had committed crime, were so egregious as to constitute due process violation, where jury was instructed that attorneys' arguments were not evidence and evidence was so strong that improper argument did not likely affect outcome of trial. U.S.C.A. Const. Amends. 5, 14.

38. Habeas Corpus ⇐497

To constitute error warranting habeas corpus relief, alleged prosecutorial misconduct during closing arguments of sentencing phase must so infect sentencing proceeding with unfairness as to violate due process. U.S.C.A. Const.Amends. 5, 14.

39. Criminal Law ⇐726

Prosecutor's remarks during closing argument of sentencing phase which compared jury's duty to follow law related to death penalty and fighting of war and killing in line of service did not violate due process, as remarks, though a "bit dramatic," were made in response to defense counsel's reference to commandment "thou shalt not kill" in Bible. U.S.C.A. Const.Amends. 5, 14.

40. Criminal Law ⇐1114.1(1)

Information outside record is not to be considered in determining sufficiency of evidence to sustain conviction; such information will only be considered as basis of some other independent claim.

41. Homicide ⇐234(11)

Evidence was sufficient to sustain murder convictions, despite alleged deficiencies and contradictions in testimony of key witness, as testimony was highly corroborated by weapons and physical evidence, independent witnesses placed defendants in presence of victims, independent witness heard shots fired, and defendant's alibi testimony was not convincing.

42. Homicide ⇐343

Even if armed robbery convictions were reversed due to lack of sufficient evidence, death sentences on murder charges did not necessarily need to be vacated on grounds that robbery convictions were considered as aggravating factors; defendants were also convicted of aggravated kidnapping, which could support felony-murder basis for death sentence, and evidence of other alternatives for imposing death sentences could render vacating robbery convictions harmless error.

43. Robbery ⇐24.15(2)

Evidence, including alleged accomplice's testimony that he was told that $1,800 had been taken from murder victims and that he received $125 of proceeds, was sufficient to sustain defendants' armed robbery convictions.

44. Habeas Corpus ⇐775(2)

Fourth Amendment claims are not cognizable on federal habeas corpus petition if state has provided full and fair opportunity to litigate issue. U.S.C.A. Const.Amend. 4.

45. Habeas Corpus ⇐775(2)

Habeas petitioner failed to establish claim that judge who heard suppression motion was corrupt, thus, petitioner could not argue that certain photographs were seized in violation of Fourth Amendment, as petitioner had full and fair opportunity to litigate issue before state court. U.S.C.A. Const. Amend. 4.

46. Habeas Corpus ⇐385

Fairly presenting claim on direct appeal from state conviction will exhaust claim and

preserve it for federal habeas corpus relief, even if state court fails to expressly address issue in its opinion.

47. Habeas Corpus ⇐337, 365

Habeas petitioners waived argument that continued presence of appellate court judge's wife on jury, after introduction of evidence that appellate judge had sentenced one of defendants when that judge served on lower court, was erroneous, except as to ineffective assistance of counsel claims, where petitioners failed to object at time evidence was introduced and failed to adequately present issue on motion for new trial. U.S.C.A. Const.Amend. 6.

48. Criminal Law ⇐641.13(1)

In order to succeed on ineffective assistance of counsel claim, it must be shown both that attorney's performance was deficient and that deficiency prejudiced petitioner. U.S.C.A. Const.Amend. 6.

49. Criminal Law ⇐641.13(1)

On ineffective assistance of counsel claim, it is presumed that counsel performed competently, and presumption can only be overcome by specific acts or omissions that fell outside wide range of professionally competent assistance. U.S.C.A. Const.Amend. 6.

50. Criminal Law ⇐641.13(1)

To satisfy prejudice component of ineffective assistance of counsel claim, petitioner must have been prejudiced in causal sense, such that there is sufficient probability that error affected outcome, and result of proceeding must have been fundamentally unfair or unreliable due to deprivation of substantive or procedural right to which petitioner was entitled. U.S.C.A. Const.Amend. 6.

51. Jury ⇐97(1)

Whether particular juror was biased is generally factual question.

52. Habeas Corpus ⇐770

On habeas review, district court must defer to factual determinations of state court unless statutory exception is satisfied, but this does not preclude application of conclusive presumption of juror bias where appropriate. 28 U.S.C.A. § 2254(d).

53. Habeas Corpus ⇐770

Whether juror's partiality may be conclusively presumed from circumstances is question of federal law on which district court hearing habeas corpus petition does not defer to state courts.

54. Jury ⇐132

Juror bias will only be presumed in extreme and exceptional circumstances.

55. Habeas Corpus ⇐688, 750

Habeas petitioners were not entitled to discovery and evidentiary hearing on claim that continued presence of juror who was married to judge who had once sentenced one of petitioners, after evidence concerning that judge was introduced, was erroneous; there was no dispute as to prior conviction for which judge sentenced petitioner, and it was not highly likely that juror was influenced by knowledge that her husband had given petitioner lengthy sentence.

56. Jury ⇐108

Venirepersons who state that they could not impose death penalty may properly be excluded from jury in capital murder case.

57. Jury ⇐108

Venireperson in capital murder case was properly struck for cause where venireperson's responses to questions about death penalty were equivocal, venireperson indicated doubts as to whether he could participate in deciding capital case, and venireperson ultimately answered that it was "probably true" that he could not consider death penalty.

58. Habeas Corpus ⇐770

Factual findings as to juror's ability to follow instructions in light of juror's views on capital punishment are findings of fact to which deference is owed. 28 U.S.C.A. § 2254(d).

59. Habeas Corpus ⇐479, 486(5)

Habeas corpus relief was not warranted by trial court's refusal to grant continuance prior to sentencing phase of trial or alleged ineffective assistance of counsel for failing to present mitigating evidence, where petitioner failed to point to any mitigating evidence that he would have presented had a continuance

been granted or had his counsel been effective. U.S.C.A. Const.Amend. 6.

60. Habeas Corpus ⇐479

In order to succeed on habeas claim based on denial of continuance, petitioner must satisfy ordinary abuse of discretion standard that would apply on direct review and denial of continuance must also have rendered proceeding fundamentally unfair; analysis must be conducted in light of need for continuance and any actual prejudice resulting from denial.

61. Habeas Corpus ⇐770

Issue of whether denial of continuance resulted in fundamentally unfair trial warranting habeas corpus relief is mixed question of law and fact; deference is owed to any state court findings of fact.

62. Criminal Law ⇐586

Trial court is entitled to broad discretion on matters of continuance.

63. Habeas Corpus ⇐406

Habeas petitioner's failure to present claim in postconviction petition that failure to adequately develop record for direct appeal, as to mitigating circumstances, was due to ineffective assistance of trial counsel and/or appellate counsel waived ineffective assistance claim for use as cause in excusing failure to develop record. U.S.C.A. Const. Amend. 6.

64. Habeas Corpus ⇐365

Habeas petitioner could not claim prejudice due to denial of continuance before sentencing proceeding, if success on claim required presentation of evidence outside of record, where claim was not made in postconviction petition, nor were facts supporting prejudice alleged in that petition.

65. Criminal Law ⇐598(2)

Trial court's denial of continuance before sentencing phase of murder trial was not erroneous, as defense counsel should have been aware that state would seek death penalty, counsel had opportunity to speak to defendant and his family to develop mitigating evidence, trial court was not informed that counsel wished to develop evidence, and no prejudice occurred as to evidence of murder charges in different state because defendant was subsequently convicted in that state, indicating that defendant probably could not have convinced sentencing jury that his participation in those murders had not been proven.

66. Habeas Corpus ⇐338

Habeas petitioner waived claim that counsel was ineffective in failing to present mitigation evidence, where petitioner failed to present adequate facts to support such claim before state court. U.S.C.A. Const. Amend. 6.

67. Costs ⇐302.3

Just as there is no constitutional obligation to provide postconviction counsel, there is no constitutional obligation to provide such counsel with adequate investigative resources. U.S.C.A. Const.Amend. 6.

68. Habeas Corpus ⇐498

Studies conducted by professor which allegedly indicated that jury instructions on death penalty were inadequate to guide jury did not support claim upon which habeas relief would be granted; even if studies did support cognizable claim, such claim would be new rule which could not be applied retroactively.

69. Criminal Law ⇐1206.1(2)

Illinois death penalty statute did not violate constitution by permitting jury to consider nonstatutory aggravating factors. Ill.Rev. Stat.1977, ch. 38, § 9–1.

70. Criminal Law ⇐1206.1(2)

Illinois death penalty statute did not violate constitution by failing to provide for adequate appellate review. Ill.Rev.Stat.1977, ch. 38, § 9–1.

71. Criminal Law ⇐1206.1(2)

Illinois death penalty statute did not violate constitution by providing prosecutors with unfettered discretion in pursuing sentences of death. Ill.Rev.Stat.1977, ch. 38, § 9–1.

72. Criminal Law ⇐1206.1(2)

Provisions of Illinois death penalty statute as to burdens of persuasion and weighing

factors to be considered did not violate constitution. Ill.Rev.Stat.1977, ch. 38, § 9–1.

73. Constitutional Law ⇐250.2(3)

Criminal Law ⇐1208.1(6)

Fact that Illinois law as to burdens of persuasion in death penalty cases may have changed over the years did not support equal protection claim. U.S.C.A. Const.Amend. 14; Ill.Rev.Stat.1977, ch. 38, § 9–1.

74. Habeas Corpus ⇐377

Habeas petitioners' failure to present claim that trial judge accepted bribes in other cases and was thus biased toward prosecution in petitioners' cases, until appeal from denial of postconviction relief, was excused where information regarding alleged bribes did not become public until that time.

75. Habeas Corpus ⇐365

Habeas petitioners waived claim that judge who presided over postconviction proceedings was biased toward state because he accepted bribes from defendants in other cases, where claim was not raised until supplementary habeas petition even though allegations of judge's improprieties surfaced before petitioners even filed their postconviction petitions.

76. Criminal Law ⇐655(1)

Constitutional right to fair trial includes right to trial judge who is neutral, detached, and free from bias. U.S.C.A. Const.Amends. 5, 14.

77. Habeas Corpus ⇐688

Habeas petitioners were not entitled to discovery to determine whether trial judge, who allegedly accepted bribes in other cases, was biased toward state during petitioners' trial, as petitioners failed to show how existence of bias could be established in manner that was not speculative.

78. Criminal Law ⇐700(3)

State's alleged failure to disclose police report which stated that only one piece of rope was found in apartment from which murder victims were kidnapped, even though two pieces of rope were presented at trial, and that alleged accomplice's fingerprints were found in apartment did not constitute *Brady* violation; other reports that were available revealed that only one piece of rope was found, and evidence as to fingerprints did not necessarily impeach alleged accomplice who admitted that he had been in apartment before.

79. Criminal Law ⇐726

Trial court's alleged failure to permit capital murder defendant's counsel to point out that defendants would get life imprisonment without parole if not sentenced to death, in response to prosecutor's argument that defendant would be continuing danger to society if not put to death, was not erroneous, as prosecution argued that petitioners would be dangerous to others at prison or if they escaped from prison and did not raise issue as to being dangerous because released on parole, and counsel for one defendant stated that defendant who was his client would not be back out on street in five to ten years if not sentenced to death.

80. Habeas Corpus ⇐501

Loss of common-law record from trial by habeas petitioners' postconviction counsel did not warrant habeas relief on grounds that record could reveal additional errors; briefs from direct appeal were available and any errors not raised on direct appeal would be waived, mere speculation about potential for finding error was insufficient, and petitioners bore risk of error by their own attorney.

On Motion to Alter or Amend Judgment

81. Habeas Corpus ⇐501

District court's reading of trial transcript without benefit of trial exhibits did not undermine district court's determination, on habeas review, that petitioners' convictions were sustained by sufficient evidence; transcript was understandable without exhibits, and petitioner failed to point to any exhibit for which actual examination was necessary to determine sufficiency of evidence.

82. Habeas Corpus ⇐883.1

Habeas corpus petitioner was not entitled to funds to conduct further discovery related to documents accumulated by private investigator for copetitioner, as to separate murder charges against copetitioner, absent

specific allegations as to what facts could support ground for relief.

83. Habeas Corpus ⇐480

Habeas petitioner's claim that alleged accomplice had one or two prior convictions that were unknown at time of trial did not support claim for relief, absent contention that prosecution knew of convictions at time of trial.

84. Habeas Corpus ⇐491

Claim that recently discovered police report showed that only one piece of rope was recovered from apartment where murder victims had been held, though two pieces of rope were introduced at trial, did not warrant habeas corpus relief, as there was no reasonable probability that petitioners could have shown that rope evidence presented at trial was fabricated and that such showing would have resulted in their being found not guilty.

Robert H. Farley, Jr., Robert H. Farley, Jr., Ltd., Naperville, IL, Stephen E. Eberhardt, Chicago, IL, for petitioner Collins.

Steven J. Zick, Terence Madsen, Chicago, IL, for respondent Welborn.

Gilbert H. Levy, Seattle, WA, Martin Carlson, Chicago, IL, for petitioner Bracy.

Terence Madsen, IL Atty. Gen. Office, Chicago, IL, for respondent Gramley.

MEMORANDUM OPINION AND ORDER

HART, District Judge.

Roger Collins and William Bracy[1] were found guilty of armed robbery, aggravated kidnapping, and the murders of Frederick Lacey, R.C. Pettigrew, and Richard Holliman in a joint, jury trial in the Circuit Court of Cook County, Illinois. The offenses were committed in 1980. Following a two-staged sentencing hearing, Collins and Bracy were both sentenced to death on the murder convictions. Each was also sentenced to concurrent terms of 60 years' incarceration on the armed robbery and aggravated kidnapping charges. On appeal, the kidnapping sentences were each reduced to 30 years. All the convictions were affirmed as were the sentences of death. *People v. Collins*, 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267 (*"Collins I"*), *cert. denied*, 474 U.S. 935, 106 S.Ct. 267, 88 L.Ed.2d 274 (1985). Post-conviction relief was denied by the trial court and that denial was affirmed. *People v. Collins*, 153 Ill.2d 130, 180 Ill.Dec. 60, 606 N.E.2d 1137 (1992) (*"Collins II"*), *cert. denied*, — U.S. —, —, 113 S.Ct. 2355, 2356, 124 L.Ed.2d 263, 264 (1993). Collins and Bracy then filed separate federal habeas corpus petitions raising a number of claims. The two cases were consolidated. Presently pending are respondents' motions to deny the two petitions.[2]

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1. The spelling contained in the present petition will be used. The state court record, however, spells his name "Bracey."

2. In one of his supplemental petitions, Collins expressly adopts the arguments of Bracy. Where applicable, the arguments of one petitioner will also be considered as to the other petitioner. Essentially no restriction was placed on petitioners' opportunity to brief their claims. Leave to file 100-page briefs was granted.

I. FACTUAL BACKGROUND

Collins I summarizes the facts:

"On November 12, 1980, sometime after 10 p.m., Frederick Lacey, R.D. Pettigrew and Richard Holliman were taken from apartment 206 at 2240 South State Street in Chicago, placed in a red Oldsmobile, and driven to a viaduct at Roosevelt Road and Clark Street, where they were shot to death. Police officers investigating at the scene found Lacey lying on the ground on the driver's side of the automobile. Pettigrew was lying partially under the right front bumper with pieces of rope and cloth tied around his right wrists. Three expended shotgun shells were found near his body. Holliman was discovered in the back seat, his hands bound with cloth. The record shows that Lacey had been shot in the back of the head. Pettigrew, in addition to being shot in the face, chest and leg, had four shotgun wounds in his back. Holliman had been shot three times in the chest and once in the back of the neck.

"The chief prosecution witness was Morris Nellum, who admittedly took part in the crimes. To secure his testimony, the State agreed to recommend a sentence of three years in protective custody in exchange for Nellum's guilty plea to three counts of concealing a homicidal death. The State also agreed to relocate his family.

"As to the events which occurred on the night of November 12, 1980, Nellum testified as follows. He was with his girlfriend, Regina Parker, at her apartment at 2222 South State Street. At approximately 9:30 p.m., Collins came to the apartment and asked him to go to apartment 206 at 2240 South State, saying he had something he wanted Nellum to take care of. Nellum went to that location, arriving approximately 10 minutes later. In one of the bedrooms he observed Collins, Bracey, Hooper, and three men he did not recognize. Two of the men, later identified as Pettigrew and Holliman, were on the bed with their hands bound. The third, later identified as Lacey, was standing at the side of the bed. Collins asked Nellum to drive his (Collins') brown Cadillac to Roosevelt Road and Clark Street because '[Collins] was going to drop some people off, leave them tied up and he wanted me to pick him up.' Nellum took Collins' keys and went to the parking lot outside the building where Collins' Cadillac was parked. He observed Collins, wearing a wide-brim hat, Bracey, Hooper, and the three victims emerge from the building and walk to the red Oldsmobile. The three victims were placed in the rear seat; Collins and Hooper got in the front seat, with Collins driving. Bracey meanwhile went to his own automobile, which was parked nearby. After the two vehicles departed, Nellum waited a few minutes as instructed, and then followed. As he approached the viaduct at Roosevelt Road and Clark Street, he heard a series of shots. Immediately thereafter, he saw Bracey, carrying a sawed-off shotgun, and Hooper run to Bracey's automobile. Collins got in his own car alongside Nellum. As they sped from the scene, Collins said: 'That damn Hooper. I told him to wait until—I wanted to use the shotgun because they can't trace the shotgun, but he used the gun in-

stead.' According to Nellum, the two vehicles returned to the parking lot at 2240 South State, where Bracey gave him $125 and told him 'Just be cool.' Nellum then drove with Collins to 31st Street and Lake Michigan, where Collins threw two handguns into the lake. Nellum identified a .38-caliber Charter Arms revolver and a .357 Rigueur revolver as the weapons that were thrown in the lake.

"On cross-examination Nellum testified that he did not know the reason for the killings but that he went along for a 'piece of the action.' He also testified that about two months after the murders Hooper told him that $1,800 had been taken from the victims. His credibility was weakened by his admission that he lies when he has to, although he stated that his testimony and statements to the police had been truthful. Yet, he admitted he lied to the police concerning the location of the two handguns. Following his arrest, Nellum denied any knowledge of the whereabouts of the weapons. Three weeks prior to trial, however, he directed the authorities to 31st Street and Lake Michigan, where the guns were recovered by divers. Nellum also testified that he decided to cooperate after prosecutors informed him they would not charge him with murder, but would instead recommend a three-year sentence in exchange for his guilty plea to three counts of concealing a homicidal death.

"Under further cross-examination, Nellum denied knowing the victim Lacey and said he could not recall ever having his picture taken with him. The defendants, however, introduced into evidence a series of photographs taken in August of 1980 which showed Nellum and Lacey together with a number of other individuals.

"Daretha Redmond testified that she lived in a first-floor apartment at 2240 South State. Sometime after 10 p.m. on the night of the murders, she saw a group of about five men, two of whom appeared to be tied, walk past her living room window. Approximately one month later, she was questioned by the police and shown about 40 photographs. Redmond testified she identified photographs of Collins, Nellum and Hooper as resembling men that were in the group. She further testified that the man leading the group wore a wide-brim hat and that he could have been Collins.

"On cross-examination Redmond stated she had never seen Bracey before. She also stated that because she did not see the face of the man who was leading the group, she could not say for certain that she saw Collins on the night of the murders.

"Laverne Lyles testified that in November 1980 she lived in a fifth-floor apartment at 2240 South State. On the evening of November 12, she went grocery shopping with two friends, returning to the parking lot of her building around 10 p.m. Lyles testified she went to her apartment to get a shopping cart for her groceries. As she walked downstairs, she saw Collins on the second-floor landing wearing a 'Spanish type' hat and a long, maroon or burnt-orange leather coat. According to Lyles, Collins was on the apartment side of the stairway door and was closing the door as she approached. Lyles stated she went to her automobile and as she was unloading her groceries from the trunk, she observed three men come out of the building and walk toward the parking lot. One of the men, she said, had his hands tied and had a long handkerchief hanging from his mouth. Lyles further testified that she identified a photograph of Bracey as the man in the lead and a photograph of Pettigrew as the man with his hands bound. She could not identify the third man. She also identified a photograph of Collins wearing a wide-brim hat and said it was the same hat he was wearing when she saw him on the second-floor landing.

"Christina Nowell told the jury that she first met defendant Bracey in May of 1980 at the King Midas Lounge in Chicago. In late August, Bracey came to her home, and she showed him a .38-caliber Charter Arms revolver which she kept in the bedroom. Nowell stated she went to the basement for a short time, leaving Bracey in the room alone. The following day she discovered that her gun was missing. Nowell further testified that, in early September 1980, she was at the King Midas Lounge with Bracey; that a man and woman came to their table; that the woman gave Bracey a brown paper bag con-

taining a sawed-off shotgun; and that Bracey 'broke down' the gun and gave it to William Lane, an employee of the lounge, who put the weapon behind the bar.

"On November 25, 1980, she was again at the lounge with Bracey and asked him when he was going to return her revolver. Nowell testified an argument ensued during which Bracey threatened to have her 'wasted.' He then told her 'he had murdered some people with [her gun] and threw it in the Chicago River.'

"The evidence also showed that on December 30, 1980, police officers conducting a search of apartment 206 at 2240 South State found two pieces of rope in a bedroom closet. An expert from the Chicago Police Department Crime Laboratory testified that one of the pieces had the same characteristics as the rope found on Pettigrew's wrist and that they 'could' have come from the same length of rope. The expert admitted, however, that it was a very common type of rope, found in almost any hardware store.

"A firearms expert testified regarding the tests performed on the revolvers recovered from Lake Michigan. The tests revealed that the .38-caliber Charter Arms revolver would mark a bullet with eight lands and grooves to the right while the .357 Rigueur revolver would mark a bullet with five lands and grooves to the right. Bullet or bullet fragments bearing the characteristics of at least one of the weapons were found in each victim. However, because of their rusty condition, the expert could not say for certain that the guns fired the bullets taken from the victims. However, the Charter Arms revolver, by use of its serial number, was found to be the gun that had been stolen from Christina Nowell. The expert also testified that the expended shotgun shells found near Pettigrew's body were fired from the same shotgun but that no shotgun was admitted for testing.

"Both defendants raised alibi defenses. In addition, they introduced testimony which suggested that Nellum, Hooper and a man named Jesse were responsible for the crimes.

"Bracey's alibi consisted of the testimony of his sister, Barbara Harris. When she was asked to recount the events of November 12, the State objected and argued at a side bar that they had not been informed that Bracey would present an alibi. (Indeed, the record shows that four days earlier Bracey's attorney told the State there would no [sic] be alibi defense.) The court then called a recess to give the State an opportunity to question Harris. When she again took the stand she testified that, at approximately 6 p.m. on the day of the murders, Bracey came to her home and had dinner with her and her husband. According to Harris, her husband went to bed between 7 and 7:30, after which she and Bracey discussed a number of financial matters pertaining to his work as an artist. Bracey, she said, left her home after 11:30 p.m. Under cross-examination, Harris admitted she never told the police, State's Attorney, or anyone else in authority that Bracey was with her on the night of the murders.

"Bracey, testifying in his own behalf, said he had known Nellum, Hooper and Lacey for a number of years and that he had known a man named Jesse for six or seven years. Saying he was at his sister's house until 11:30 p.m. on November 12, he denied being in apartment 206 on the night of the murders. He also denied ever being in Christina Nowell's home or stealing her revolver. According to Bracey, Hooper had Nowell's revolver. As to the November 25 conversation with Nowell regarding her gun, he testified that because he was a friend of Hooper, Nowell approached him in the King Midas Lounge and asked him to tell Hooper to return it. He testified he told her that the matter was between her and Hooper and that he 'didn't have nothing to do with it.' He admitted that an argument ensued and that angry words were exchanged, but denied that he threatened to have her 'wasted.' Supported by the testimony of William Lane, Bracey also repudiated Nowell's assertion that he received a shotgun in the lounge in September of 1980 and gave it to Lane, who put the weapon behind the bar.

"In an apparent attempt to reduce the impact on the jury of his criminal record, Bracey admitted on direct examination that he had three prior convictions, one for rob-

bery and two for armed robbery. Cross-examination revealed that the last conviction resulted from an armed robbery which he committed while an escapee from Stateville Penitentiary. Also on cross-examination, Bracey admitted that he never told the police he was at his sister's when the murders were committed, and that he did not tell them that a man named Jesse was involved in the crimes. He also denied telling the police that he was in the area of apartment 206 on the night of the murders. In rebuttal the State called two police officers who testified that, when questioned, Bracey admitted to being in the area of the apartment on the night of the murders. Bracey then again took the stand and explained that he merely replied affirmatively to the officers' question of whether he had 'ever' been in the vicinity of the apartment.

"Collins, also testifying in his own behalf, said he had 10 previous armed-robbery convictions. He also said he knew Nellum, Hooper, Bracey, and Lacey, having met the latter two while in prison. He further testified that on November 12 his brown Cadillac was parked behind the King Midas Lounge, where it had been for several weeks because of mechanical problems, and that he did not get the car running again until November 15 or 16. As a result, on the night of the murders he was driving his 1968 Chevrolet, which he had previously loaned to Sandra Johnson but which was returned to him on November 11.

"Collins recounted that at approximately 3 p.m. on the day of the murders he took his girlfriend, Beatrice Mack, to a nearby clinic. They then went to the apartment of Irene Parker, Mack's mother. Later that evening Collins and Mack went grocery shopping at a nearby A & P, leaving that store between 9:30 and 10 p.m. On the way back to Parker's apartment, they stopped at 2240 South State. While Mack waited in the car, Collins went to apartment 206. According to Collins, only Nellum, Hooper, Derrick Phipps, and Ben Weathers were present. Following a brief conversation, Collins rejoined Mack, and the two returned to Parker's home. There two other individuals who were visiting Parker helped them carry the groceries upstairs, after which they all ate dinner together. Collins testified that he left the apartment with Mack at approximately 1 a.m. and that they checked into a motel where they remained until the following morning.

"Mack substantially corroborated the events as related by Collins. Her cross-examination revealed, however, that she had been a heroin addict for about five months prior to November 12 and that on the afternoon of the 12th, Collins took her to a clinic where she was undergoing methadone treatment. She also stated that she first dated Collins on November 9, three days before the murders, saying they went to a kung-fu movie at the United Artist Theater in Chicago. In rebuttal the State established that no kung-fu movie was playing at that theater the week of November 9.

"Irene Parker, Carolyn Washington and Randolph Harper all testified they had dinner with Collins and Mack on the night of the murders. Washington and Harper also said that at approximately 10:30 p.m. they helped Collins carry groceries from his blue Chevrolet.

"In an attempt to establish that his Cadillac was inoperable on the night of the murder and therefore could not have been driven by Nellum, Collins called Sandra Johnson and Earl Young to the stand. Johnson, who had known Collins for almost 10 years, told the jury she was driving Collins' blue Chevrolet in early November but that she returned the automobile to him on November 11, prior to leaving for a trip to Michigan. She stated she saw Collins' Cadillac on November 10 or 11 parked behind the King Midas Lounge and upon returning from Michigan on November 13, she again observed the Cadillac parked in the same location. Her credibility may have been weakened, however, by her admission that she had been convicted of three counts of robbery and also of misdemeanor theft. In addition, she stated on cross-examination that she was receiving public aid in Illinois, but denied that the purpose of her Michigan trip was to apply for public aid in that State. In rebuttal a Chicago police officer testified to a conversation with Johnson in which she informed him that she went to Michigan to apply for public assistance.

"Young, the owner of the King Midas Lounge, testified he first noticed a brown Cadillac parked behind his establishment on November 2. Not knowing the owner, he left a note on the windshield four or five days later requesting that it be removed. Three or four days thereafter he saw a number of men, one of whom he identified as Collins, working on the automobile. According to Young, approximately one and a half to two weeks passed after he first observed the Cadillac until it was removed.

"Also testifying for the defendants were Derrick Phipps and Ben Weathers. Both claimed they were in apartment 206 with Nellum and Hooper on the evening of November 12. Bracey, they said, was not present. Around 9:30 p.m., three men, accompanied by a man identified only as Jesse, arrived and went into one of the bedrooms, followed by Nellum and Hooper. Approximately 30 minutes later, Collins arrived looking for Bracey. Upon being informed that Bracey was not present, Collins left the apartment. Shortly thereafter, Phipps and Weathers departed together, presumably leaving Nellum, Hooper, Jesse and the three men in the bedroom.

"The credibility of the witnesses was made vulnerable by the disclosure of their respective criminal records. Weathers admitted he received a 10– to 30–year sentence in 1975 for armed robbery. Phipps pleaded guilty in 1974 to an armed-robbery charge, and in 1976 he received concurrent sentences of 9 to 18 years for attempted murder and 6 to 18 years for armed robbery. (The record also shows—although it was not brought to the attention of the jury—that he was awaiting trial on two additional criminal charges when he testified.) Phipps' credibility may have been further weakened by his inability to give but the vaguest description of Jesse. Although he claimed he first met Jesse in the Stateville Penitentiary, Phipps could only say that he was about the same height and weight as the Assistant State's Attorney conducting the cross-examination. Also, after first being unable to recall what Jesse was wearing when he arrived at apartment 206, he then stated that he was wearing a wide-brim hat similar to one worn by Collins. Finally, Phipps was unable to describe any of the men who allegedly came to the apartment with Jesse, nor could he recall where the apartment was located in the building."

Collins I, 478 N.E.2d at 272–76.

II. EXHAUSTION, WAIVER AND DEFAULT

Respondents do not contend that petitioners have failed to exhaust their state court remedies as to any claim. Collins does not contend that any issues are unexhausted. Bracy indicates it is possible the Illinois courts would consider some issues of fundamental error in a second postconviction proceeding. B Reply 8.[3] The settled Seventh Circuit law is that postconviction proceedings are not necessary for exhaustion unless there is "direct precedent indicating that under the particular circumstances of a prisoner's case the waiver doctrine will be relaxed." *Harris v. DeRobertis*, 932 F.2d 619, 621 (7th Cir. 1991) (quoting *United States ex rel. Williams v. Brantley*, 502 F.2d 1383, 1386 (7th Cir. 1974)). No party points to any such direct precedent supporting that any of petitioners' present claims can still be presented in postconviction proceedings. The claims presented will be treated as exhausted.

[1–3] Respondents contend that a number of the claims have been waived because procedurally defaulted in the Illinois courts. Ordinarily, this court may only consider habeas corpus claims of state prisoners if those claims have, without procedural default, first been fairly presented to the state's highest court. *See Coleman v. Thompson*, 501 U.S. 722, 750, 111 S.Ct. 2546, 2565, 115 L.Ed.2d 640 (1991). Procedural default, however, will

3. Each subheading in Section III will make reference to the particular claims in the petitions: B for Bracy and C for Collins. Citations to claims will be by using the letter and number, *e.g.* B1, C1. Citations to paragraphs of each petition will include the paragraph symbol, *e.g.* B¶ 1, C¶ 1. Citations to pages of respondents' briefs will include R and the initial of the defendant to which that brief applies, *e.g.* RB 1, RC 1. Citations to petitioners' briefs will include reply, *e.g.* B Reply 1, C Reply 1.

not preclude consideration of the claim if cause for the default and actual prejudice is shown or if failure to consider the claims would be a fundamental miscarriage of justice. *Id.*; *Jenkins v. Gramley*, 8 F.3d 505, 508 (7th Cir.1993). Constitutionally ineffective assistance of counsel can constitute cause. *Coleman*, 501 U.S. at 752–55, 111 S.Ct. at 2566–67; *Buelow v. Dickey*, 847 F.2d 420, 426 (7th Cir.1988), *cert. denied*, 489 U.S. 1032, 109 S.Ct. 1168, 103 L.Ed.2d 227 (1989). However, the ineffective assistance of counsel claim cannot be used as cause unless the ineffective assistance claim has first been presented as an independent claim in the state court. *Murray v. Carrier*, 477 U.S. 478, 488–89, 106 S.Ct. 2639, 2645–46, 91 L.Ed.2d 397 (1986); *Morrison v. Duckworth*, 898 F.2d 1298, 1300 (7th Cir.1990). Petitioners make some general responses as to the waiver of some of their claims. These arguments will be considered here, while arguments specific to particular claims will be discussed as the individual claims are considered.

[4, 5] Petitioners assert that ineffective assistance of postconviction counsel can constitute cause excusing a procedural default. However, there being no constitutional right to counsel on postconviction review, the ineffective assistance of postconviction counsel cannot constitute cause. *Coleman*, 501 U.S. at 752–57, 111 S.Ct. at 2566–68; *Jenkins*, 8 F.3d at 508; *Williams v. Chrans*, 945 F.2d 926, 932–33 (7th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 3002, 120 L.Ed.2d 877 (1992).[4] This is true even if postconviction proceedings are the first opportunity that the claim may be raised. *Bonin v. Vasquez*, 999 F.2d 425, 429 (9th Cir.1993). However, if an issue was procedurally defaulted for postconviction review because not preserved by trial counsel or counsel presenting the direct appeal, ineffective assistance of that trial counsel or appellate counsel can constitute cause. *See Freeman v. Lane*, 962 F.2d 1252, 1258–59 (7th Cir.1992).

[6, 7] Passing reference is also made to petitioners being denied the "legal tools" necessary to perfect their postconviction remedies so that the denial of constitutionally guaranteed access to the courts also constitutes cause. *See* B Reply 6 (citing *Bounds v. Smith*, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977)). Bracy states the Supreme Court has not considered whether such a situation can constitute cause, but makes no argument in support of this contention and cites no lower court cases.[5] There are also no factual allegations as to what legal resources were unavailable or precluded where petitioners were incarcerated. No adequate argument or allegations having been made, this contention need not be considered.[6] *Cf. Thomas v. Lewis*, 945 F.2d 1119, 1123 (9th Cir.1991).

[8] Citing *Beam v. Paskett*, 3 F.3d 1301, 1306–07 (9th Cir.1993), *cert. denied*, — U.S. —, 114 S.Ct. 1631, 128 L.Ed.2d 354 (1994), it is argued that the mandatory nature of the Illinois Supreme Court's review of death sentences means that no fundamental error can be considered to be waived. *See* B Reply 7–8. *Beam* concerned a death sentence under Idaho law where the pertinent statutory provision provided that the Idaho Supreme Court had "an affirmative duty to review the entire record in a capital case to determine, *inter alia*, whether 'the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.'" *Id.* at 1306 (quoting Idaho Code § 19–2827). Based on this statute and Idaho case law, the Ninth Circuit held that, regardless of whether it was raised in briefs or expressly discussed in the Idaho Supreme Court's opinion, the Idaho Supreme Court necessarily had decided whether the death sentence had been based on an arbitrary factor and therefore there could be no procedural default on such a claim. Recently, the Eighth Circuit distinguished *Beam*. It held that a Missouri statute that required review of "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," Mo.Rev.Stat. § 565.035.3(1), only required the Missouri Supreme Court to review whether any of the aggravating factors considered by the jury was an "arbitrary factor," and did not mandate review of all instructional and constitutional errors for arbitrariness. *Nave v. Delo*, 22 F.3d 802, 815–16 (8th Cir.1994).

Illinois law provides: "The conviction and sentence of death shall be subject to automatic review by the Supreme Court. Such review shall be in accordance with rules promulgated by the Supreme Court." 720 ILCS 5/9-1(i). This statute is mandated by the Illinois Constitution. Ill. Const. Art. 6, § 4(b) (1970) ("Appeals from judgments of Circuit Courts imposing a sentence of death shall be directly to the Supreme Court as a matter of right.") The Illinois Supreme Court has promulgated the following rules. "[A]ppeals by defendants from judgments of the circuit courts imposing sentence of death shall lie directly to the Supreme Court as a matter of right." Ill.Sup.Ct.R. 603. "In cases in which a death sentence is imposed, an appeal is automatically perfected without any action by the defendant or his counsel." *Id.* 606(a).

[9] Unlike Idaho law, or even Missouri law, Illinois law does not mandate that specific issues be considered by the Illinois Supreme Court. The case law is consistent with the statutory provision. Under Illinois law, to preserve an issue for appeal from a criminal conviction, it generally must be raised at trial and also presented in a motion for new trial pursuant to 725 ILCS 5/116-1. *People v. Enoch*, 122 Ill.2d 176, 119 Ill.Dec. 265, 270–71, 522 N.E.2d 1124, 1129–30, *cert. denied*, 488 U.S. 917, 109 S.Ct. 274, 102 L.Ed.2d 263 (1988). This rule applies to capital cases. *Id.*, 522 N.E.2d at 1131. "[O]ur constitutional obligation to review death penalty cases does not require us to review every issue raised on appeal when the issues are not properly preserved by an objection in the trial court and a written post-trial motion.... [W]hen the defendant fails to comply with the statutory requirement to file a post-trial motion, our review will be limited to constitutional issues which have been properly raised at trial and which can be raised later in a post-conviction hearing petition, sufficiency of the evidence, and plain error." *Id.*, 522 N.E.2d at 1131–32. *See also People v. Banks*, 161 Ill.2d 119, 204 Ill.Dec. 107, 118, 641 N.E.2d 331, 342 (1994); *People v. Hudson*, 157 Ill.2d 401, 193 Ill.Dec. 128, 137, 626 N.E.2d 161, 170 (1993). Neither the statute nor Illinois case law mandates that the Illinois Supreme Court decide all possible issues that could be raised on direct review of a capital case. No issues can be assumed to have been decided by the Illinois Supreme Court that were not presented to or discussed by the court. Even those issues, such as plain error, which are not waived by failure to present them in the trial court, still must be fairly presented to the Illinois Supreme Court either on direct appeal or through postconviction proceedings or they will be waived for purposes of federal habeas corpus review.

[10] If a state procedural bar of an issue is not applied with regularity and consistency, it will not preclude raising the issue in a federal habeas corpus petition. *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988). *Johnson* applies prior Supreme Court precedent holding that a "state procedural ground is not 'adequate' unless the procedural rule is 'strictly or regularly followed.'" *Id.* at 587, 108 S.Ct. at 1987 (quoting *Hathorn v. Lovorn*, 457 U.S. 255, 262–63, 102 S.Ct. 2421, 2426–27, 72 L.Ed.2d 824 (1982) (quoting *Barr v. City of Columbia*, 378 U.S. 146, 149, 84 S.Ct. 1734, 1736 (1964)). The Seventh Circuit has explained what is meant by "ade-

4. Petitioners contend that *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), implicitly overrules cases holding that there is no right to counsel on collateral review. Assuming *McCleskey* contains such an implicit holding, petitioners ignore that *Coleman*, 501 U.S. at 752–55, 111 S.Ct. at 2566–67 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989)), expressly reaffirms that there is no right to counsel on collateral review. *Coleman* was decided after *McCleskey*, as were *Jenkins* and *Williams v. Chrans*.

5. The Tenth Circuit has observed that such circumstances may constitute cause. *See Dulin v. Cook*, 957 F.2d 758, 760 (10th Cir.1992).

6. Lack of legal resources at a prison generally will not constitute unconstitutional interference with access to the courts where the prisoner also has the assistance of counsel. *See Casteel v. Pieschek*, 3 F.3d 1050, 1054 & n. 4 (7th Cir. 1993).

quate" and by "strictly or regularly followed."

> A state ground is "adequate" only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show the state is discriminating against the federal rights asserted.
>
> * * * * * *
>
> A requirement of consistency poses special problems for forfeiture rules, because every state uses exceptions such as "plain error" or "sufficient reason" or even "cause and prejudice" to deal with cases in which application of the ordinary rules would produce unacceptably harsh consequences.
>
> * * * * * *
>
> Statements such as the one in *Barr* that a state procedural ground will be respected only when "strictly or regularly followed," 378 U.S. at 149, 84 S.Ct. at 1735, turn out to be too strong, unless the "procedural ground" is understood to be a complex of rules and qualifications. Wisconsin employs a rule that failure to raise a ground forfeits it unless there are "sufficient" reasons. A rule of forfeiture-unless-good-reasons may be "strictly" followed when the state is scrupulous about treating particular reasons as "sufficient" routinely and others as insufficient with equal regularity.
>
> Searching for "regularity" in the state's employment of excuses and exceptions would embroil the federal court deeply in questions of state law and procedure. An alternative to the comprehensive survey of state cases every time a state invokes waiver is to recharacterize what it means for a state to apply its rule strictly. Both the Supreme Court and the inferior courts respect state procedural grounds unless they are regularly *dis*regarded (or seemingly have been manufactured for the occasion as in *Johnson*). A state ground that is solidly established will be respected even though not "strictly" followed. Any other approach would discourage state courts from applying plain error doctrines, lest giving one prisoner a break disables the state from enforcing its procedural rules with respect to many others.

Prihoda v. McCaughtry, 910 F.2d 1379, 1384 (7th Cir.1990).

[11, 12] It is contended that the Illinois Supreme Court declined to apply plain error in Bracy's and Collins's case, while applying it in other cases. C22–23. It is argued that, in at least two other cases, the Illinois Supreme Court has found error in prosecutors' closing remarks even though those remarks were provoked by arguments of defense counsel. C Reply 58–59 (citing *People v. Monroe*, 66 Ill.2d 317, 5 Ill.Dec. 824, 362 N.E.2d 296 (1977); *People v. Stock*, 56 Ill.2d 461, 309 N.E.2d 19 (1974)). *See also* C Reply 62 (citing *People v. Brisbon*, 106 Ill.2d 342, 88 Ill.Dec. 87, 478 N.E.2d 402, *cert. denied*, 474 U.S. 908, 106 S.Ct. 276, 88 L.Ed.2d 241 (1985)). It is contended that the application of invited error in *Collins I*, 478 N.E.2d at 287–88, is inconsistent with *Monroe* and *Stock*. The issue of invited error and whether petitioners were prejudiced by these particular prosecutorial arguments[7] is more in the nature of a substantive ruling than a procedural bar. Errors of state law are not a basis for granting federal habeas corpus relief. *Williams v. Chrans*, 945 F.2d at 956. An allegedly incorrect application of state law does not become a basis for habeas corpus relief simply by recharacterizing it as an equal protection violation because some defendants have different law applied to them. *Bowser v. Boggs*, 20 F.3d 1060, 1065–66 (10th Cir.1994). Also, this case does not involve arbitrary application of the law that might support an equal protection claim. *See Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363, 1386 (7th Cir.1994) (en banc). Collins's Claims XXII and XXIII are not cognizable as independent claims.

As to the invited error issue, it is unnecessary to consider whether it is a procedural bar and, if so, whether such a bar has been inconsistently applied. Respondents do not contend that the prosecutorial misconduct issue to which invited error was applied has been waived because of any procedural bar. Instead that issue is addressed on the merits and will be discussed below.

7. The particular remarks of the prosecutor are discussed more fully in § IIIC, *infra*.

[13] It is also contended that the Illinois Supreme Court has been inconsistent in applying the plain error rule to prosecutorial remarks for which there were no contemporaneous objections. *See* C Reply 59–64. Only one case is cited where prosecutorial remarks were held to be reversible error even though no contemporaneous objection had been made. *See People v. Holman*, 103 Ill.2d 133, 82 Ill.Dec. 585, 602–07, 469 N.E.2d 119, 136–41 (1984), *cert. denied*, 469 U.S. 1220, 105 S.Ct. 1204, 84 L.Ed.2d 347 (1985). The prosecutorial remarks involved in that case and the cases cited therein, *see id.*, 469 N.E.2d at 140–41, are different from those involved in the present case. The Illinois Supreme Court may find plain error as a result of certain prosecutorial remarks without finding it in different remarks without being legally inconsistent. Petitioners have not made a showing of freakish application that would satisfy the standard set forth in *Prihoda*. The Illinois Supreme Court did not rely on any procedural bar that was inadequate.

III. GROUNDS ASSERTED FOR RELIEF

Each petitioner has raised a number of issues. Bracy has divided his petition into 17 separate claims and Collins has divided his petition into 23 claims plus an additional 14 that he seeks to raise in three supplemental petitions.[8] Most issues have been raised by both petitioners. Therefore, each petitioner's contentions will be considered together, with all applicable arguments being considered as to each petitioner. All issues raised will be considered. The claims are addressed in the order set forth in Collins's petition, the lower numbered case.

A. Exclusion of African–Americans from Jury (B2, C1)

It is alleged that the venire of 60 potential jurors contained 5 or 6 African–Americans. C¶ 396. Over objection, one African–American, Harry Cooper, was excused for cause because of commitments to his Little League team. C¶ 397–98; B¶ 59. At the time, no other African–Americans were among those under consideration for the jury. C¶ 399. The State exercised its peremptory challenges as to two African–American venirepersons. C¶ 401–02. The allegations do not specify whether any African–Americans were members of the jury that was impaneled.

[14] Since decided after direct review in this case had been completed, *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), is inapplicable to petitioners' claims. *Williams v. Chrans*, 945 F.2d at 942–46. Petitioners (through Collins, C Reply 13–14) contend they can show systematic exclusion of African–Americans that is prohibited by *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). On postconviction review, the Illinois Supreme Court denied this claim on the ground that Bracy and Collins "did not raise any claim of the case-by-case exclusion of blacks required by *Swain* nor have they submitted any affidavits or made any sort of showing of this practice." *Collins II*, 180 Ill.Dec. at 64, 606 N.E.2d at 1141.

[15] Failure to fairly present a claim to the state court constitutes a procedural default barring the presentation of the claim on federal habeas corpus review. *See Verdin v. O'Leary*, 972 F.2d 1467, 1472–73 (7th Cir. 1992). This includes fairly presenting the operative facts. *Keeney v. Tamayo–Reyes*, — U.S. —, —, 112 S.Ct. 1715, 1719, 118 L.Ed.2d 318 (1992); *Verdin*, 972 F.2d at 1474. The *Swain* claim has been procedurally defaulted. However, such default will be excused if cause and prejudice can be shown. *See Coleman*, 501 U.S. at 750, 111 S.Ct. at 2565. Petitioners (through Collins, C Reply 14–15) contend cause can be shown by the ineffective assistance of postconviction counsel. Ineffective assistance of postconviction counsel cannot constitute cause. *See Coleman*, 501 U.S. at 752–57, 111 S.Ct. at 2566–68; *Jenkins*, 8 F.3d at 508; *Williams v. Chrans*, 945 F.2d at 932–33; *Bonin*, 999 F.2d at 429. The *Swain* claim has been waived

8. Leave is granted to file the supplemental petitions.

for failure to adequately present it to the state courts. Collins Claim I will be denied.

The focus of Bracy's allegations (B¶ 59) is that it was erroneous to excuse Cooper for cause. It is conceded that this issue was not raised in the Illinois courts (B¶ 60), but it is contended that failure to do so was ineffective assistance of counsel. Neither Bracy nor Collins support this contention. Bracy makes no specific argument as to either the merits of this issue or the alleged ineffective assistance in failing to object at the time Cooper was excused. No grounds for excusing the procedural default is found. Bracy Claim II is held to be waived for failure to raise it in the state courts.

B. Nellum's Testimony—Discovery and a Hearing (B5, B6, C2)

In early 1992, a private investigator hired by Bracy's attorney spent 25 hours interviewing Morris Nellum.[9] Some of the interview was recorded. In July 1992, Nellum gave a sworn statement before a court reporter to counsel for Bracy. In the interviews and in the statement, Nellum said that some of his testimony at Bracy's and Collins's trial was false.

Thereafter, in April 1993, counsel for Bracy partially deposed Nellum in the Arizona postconviction proceedings, but, after answering some questions, without adding to his earlier statements, Nellum declined to continue unless his testimony was taken before a judge. Thereafter, the Arizona court declined to continue the deposition. Petitioners seek further discovery and a hearing to introduce additional Nellum testimony.

Although not stated by Nellum, it is argued that the assistant State's Attorney knew his testimony was false when given, and knowing use of the false testimony is alleged by both petitioners.

In the interviews, statement, and deposition, Nellum does not testify that Collins and Bracy were not involved in the murders. He instead testifies that certain specific statements by him were false. Contrary to his trial testimony, Nellum said that he was beaten by and threatened by the police when he was first arrested and gave an initial statement. *See* Nellum Stmt.[10] 10–11, 15, 17–18, 20. He also stated that he was on one side of a two-way mirror adjoining an interrogation room where he saw Bracy being beaten. *Id.* at 14, 18. He states that his testimony that he saw Hooper at the scene of the crime was false.[11] *Id.* at 12, 19–20. His testimony that he saw Bracy with a shotgun was also said to be false. *Id.* at 22–23. He confirmed his testimony that he saw Collins with guns and that he was in a car with Collins. *Id.* at 23. He also testified that the assistant State's Attorney helped him get a job with musicians. This was after the trial and not promised prior to the conclusion of the trial. *See id.* at 23–24. Earlier in 1992, he told the private investigator that he never heard any gunshots and that he did not see Collins and others lead the murder victims to the car. This recantation was not repeated in his sworn statement or partial deposition.

[16] Respondents primarily argue that recantation issues have been waived because not presented to the Illinois courts. The 1992 statements of Nellum occurred after the opening brief had already been filed in the postconviction appeal. Postconviction counsel raised the issue of recantation by Nellum for the first time in a reply brief, but that section of the brief was stricken and the issue is not discussed by the Illinois Supreme Court. *See Collins II*. Petitioners do not dispute that this issue has never been adequately presented to the Illinois Supreme Court and that an argument can be made that it is too late to do so now. They contend, however, that it was newly discovered evidence and therefore cause exists for not having previously presented it to the Illinois Supreme Court. There is no contention by respondents that the information could have been discovered sooner had due diligence been exercised. The discovery of new evidence may, under certain circumstances, constitute cause. *Cf. Murray*, 477 U.S. at 488, 106 S.Ct. at 2645; *Cornell v. Nix*, 976 F.2d 376, 380 (8th Cir.1992) (*en banc*), *cert. denied*, — U.S. —, 113 S.Ct. 1820, 123 L.Ed.2d 450 (1993). Here, however, the newly discovered evidence is in the nature of a partial recantation of peripheral facts which are independently supported by other testimony and exhibits.

9. At the time, counsel was representing Bracy in collateral proceedings in a subsequent double murder case in Arizona in which Bracy was also sentenced to death. *See State v. Bracy*, 145 Ariz. 520, 703 P.2d 464 (1985), *cert. denied*, 474 U.S. 1110, 106 S.Ct. 898, 88 L.Ed.2d 932 (1986). Nellum had also provided testimony in that case. This counsel now represents Bracy before this court, but in July 1992 another attorney was representing Bracy in the Illinois postconviction proceeding, which was then being briefed on appeal.

10. Citations are to the July 1992 statement which is exhibit C to Collins's Reply and exhibit B to Bracy's habeas petition.

11. In the statement, this answer is referred to as being inconsistent with testimony at Hooper's trial and inconsistent with testimony at Bracy's and Collins's trial.

[17, 18] Ordinarily, state court remedies must first be exhausted. The time for filing a postconviction petition had already expired at the time the new evidence was discovered. *See* 725 ILCS 5/122–1. The delay, however, will be excused if it was not due to the defendants' culpable negligence. *Id.* Respondents, though, do not point to any direct precedent that the Illinois courts would excuse the delay. Therefore, it is presumed that no remedy was still available in state court at the time the new evidence was discovered. *Harris v. DeRobertis*, 932 F.2d at 621.

[19, 20] The introduction of perjured testimony at a trial is not, by itself, a constitutional violation that will support the granting of habeas corpus relief. *Shore v. Warden, Stateville Prison*, 942 F.2d 1117, 1122 (7th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1973, 118 L.Ed.2d 573 (1992). There is only a constitutional violation if the prosecution knowingly used perjured testimony. *Id.*; *Del Vecchio*, 31 F.3d at 1387. Nellum's various statements do not support such a conclusion. Even if this element were satisfied, the recantation must be "substantially different" from the trial testimony and central to the decision in the case. *See Shore*, 942 F.2d at 1124. Mere impeachment generally will be insufficient. *See id.* The question is whether the new testimony is substantially different and central to the decision in the case. The recantation about being beaten and testifying falsely in Arizona only go to credibility. The false statement about whether Nellum saw Hooper at the crime scene is also peripheral to Bracy's and Collins's guilt if Nellum still links Bracy and Collins to the scene. Recanting of the testimony that he saw Bracy and Collins lead the victims to the car and that he heard gunshots does not substantially affect the State's case. Two other independent witnesses put Collins and Bracy at the scene of the abduction. Another independent witness heard the shots and the ballistics evidence strongly supports the use of a shotgun and the weapons found as a result of Nellum's information. Moreover, Nellum still states he picked up Collins at the murder site and does not expressly recant that Bracy was there.

[21] Petitioners seek permission to conduct discovery and hold a hearing, calling Nellum to testify. An investigator spent 25 hours talking to him, a sworn statement was taken by a lawyer for Bracy and a deposition was partially taken without developing a substantial recantation. Under the circumstances, good cause does not exist for permitting further discovery. *See* Rules Governing § 2254 Cases Rule 6(a); *Matta–Ballesteros v. Henman*, 896 F.2d 255, 259 (7th Cir.) *cert. denied*, 498 U.S. 878, 111 S.Ct. 209, 112 L.Ed.2d 169 (1990). Hearing additional testimony from Nellum fourteen years after the events is not warranted. Given all the facts and circumstances, additional recantation, which would have little, if any, credibility, could only be cumulative impeachment.

Collins's Claim II focuses on the use of Nellum's allegedly perjurious testimony that he was with Collins when Collins threw the murder weapon in Lake Michigan. It has not been shown that Nellum would now testify that this event did not occur or that the prosecutor knew his contrary testimony at trial was false. On postconviction review, the Illinois Supreme Court addressed the question of the gun in the lake testimony being knowing use of perjured testimony by the prosecutor. It held that "defendants have failed to provide any evidence in support of

their allegation that the prosecution knowingly used perjured testimony.... Even if we were to accept the defendants' position, they were aware of Nellum's inconsistent statements at the time of their direct appeal and they failed to raise a due process challenge at that time. Accordingly, the issue is *res judicata* for purposes of this review." *Collins II*, 180 Ill.Dec. at 665, 606 N.E.2d at 1143. Since Collins Claim II is held to lack merit, it is unnecessary to consider whether it was waived.

C. Prosecutorial Misconduct
(B4, B14, C3)

Petitioners raise issues as to prosecutorial misconduct at three stages of the trial. It is contended that the prosecutors acted improperly by bringing out evidence that certain witnesses had been relocated for protection and by using certain evidence to impeach witnesses. Petitioners also complain about certain prosecution arguments that were used in the prosecution's closing statement and in the prosecution's argument at the death penalty phase.[12]

1. Waiver

[22] Respondents contend that certain prosecutorial misconduct claims are waived because not fairly presented to the Illinois Supreme Court. Respondents argue that the claims presented to the Illinois Supreme Court were only argued on state law grounds and therefore the constitutional variations contained in the present petitions were not fairly presented to the Illinois Supreme Court. Following the Second Circuit, the Seventh Circuit has adopted the following standard as to fair presentation.

> If the petitioner's argument to the state court did not: (1) rely on pertinent federal cases employing constitutional analysis; (2) rely on state cases applying constitutional analysis to a similar factual situation; (3) assert the claim in terms so particular as to call to mind a specific constitutional right; or (4) allege a pattern of facts that is well within the mainstream of constitutional litigation, then this court will not consider the state courts to have had a fair opportunity to consider the claim. However, the presence of any one of these factors, particularly factors (1) or (2), does not automatically avoid a waiver; the court must consider the specific facts of each case.

Verdin, 972 F.2d at 1473–74 (quoting *Daye v. Attorney General of New York*, 696 F.2d 186, 194 (2d Cir.1982) (*en banc*), *cert. denied*, 464 U.S. 1048, 104 S.Ct. 723, 79 L.Ed.2d 184 (1984)).

Here, petitioners cited only state cases. However, they identified the claims as ones for prosecutorial misconduct and asserted that there were violations of due process or the right to a fair trial. In *Collins I*, the Illinois Supreme Court referred to the right to a fair trial in discussing the prosecutorial misconduct claims before it. Since prosecutorial misconduct claims are in the mainstream of constitutional litigation; references to due process and the right to a fair trial were sufficient to inform the Illinois Supreme Court that the claims were constitutionally based. *Garofolo v. Coomb*, 804 F.2d 201, 206 (2d Cir.1986); *Chisholm v. Henderson*, 736 F.Supp. 444, 446 (E.D.N.Y.1990), *aff'd by unpublished order*, 953 F.2d 635 (2d Cir.1991); *United States ex rel. Boone v. Sandahl*, 1992 WL 111089 *2 (N.D.Ill. May 8, 1992); *Saunders v. Riley*, 1991 WL 95352 *5 (S.D.N.Y. May 30, 1991). The claims presented to the Illinois Supreme Court[13] have not been waived for failure to fairly present them in constitutional terms.

2. Standard

[23] To be grounds for habeas relief, prosecutorial misconduct must have "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 91 L.Ed.2d 144 (1986) (quoting *Donnelly v. DeChristaforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974)). *Accord Romano v. Oklahoma*, — U.S. —, —, 114 S.Ct. 2004, 2012, 129 L.Ed.2d 1 (1994); *Pierson v. O'Leary*, 969 F.2d 1385, 1387 (7th Cir.), *cert. denied*, — U.S. —, 113 S.Ct. 168, 121 L.Ed.2d 115 (1992); *Williams v. Chrans*, 945 F.2d at 949. "It 'is not enough that the prosecutor's' remarks were undesirable or even universally condemned.'" *Darden*, 477 U.S. at 181, 106 S.Ct. at 2471 (quoting the court below). Viewed in the context of the entire case, any misconduct shown must be "so inflammatory and prejudicial to the defendant ... as to deprive him of a fair trial," *Williams v. Chrans*, 945 F.2d at 949 (quoting *United States v. Chaimson*, 760 F.2d 798, 809 (7th Cir.1985)) (ellipsis in *Williams*), and must have "likely changed the outcome of the trial." *Pierson*, 969 F.2d at 1387. This includes consideration of whether the misconduct was "invited" by conduct of defense counsel,[14] whether objections were sustained, and any corrective or related instructions given. *See Darden*, 477 U.S. at 182, 106 S.Ct. at 2472.

3. During Presentation of Evidence

Petitioners complain that evidence as to Lyles and Nellum being relocated was elicited by the prosecution and also raised in the prosecution's closing argument. The Illinois Supreme Court held as follows on this issue.

> ... During cross-examination of Lyles the defense brought out the fact that Lyles had received money from the State's Attorney's office. On redirect examination by the State, Lyles testified that the money had been for security deposits and rent. There is nothing unfair about allowing the State to explain on redirect examination why it gave one of its witnesses money when that fact had been brought out by the defense during cross-examination. In closing argument, the defense referred to Lyles as being "well taken care of." On rebuttal the State asked, "why do you think we moved her? Do you think we were concerned about her [sic] responsibility to Laverne Lyles?" Again, there is nothing unfair about allowing the State to explain in rebuttal argument why a defense witness was being "taken care of" by the State when that issue was raised by the defendant during closing argument. The complained-of testimony and arguments were invited by the defendants and thus did not deprive them of a fair trial....
>
> ... Nellum testified during direct examination by the State that in return for his truthful testimony and plea of guilty on the concealment charges the State had agreed to recommend "three years protective custody and relocate my family." The defendants did not object to the testimony. An agreement reached between an accomplice witness and the State to secure the witness' testimony is relevant because it goes to the credibility of the witness and the weight to be given his testimony.... Nellum's testimony concerning his agreement with the State was relevant and did not deprive the defendants of a fair trial.

Collins I, 478 N.E.2d at 280.

[24, 25] Evidence that a witness is in protective custody may be relevant, but should be used cautiously. *See United States v. Adamo*, 742 F.2d 927, 944–46 (6th Cir.1984), *cert. denied*, 469 U.S. 1193, 105 S.Ct. 971, 83 L.Ed.2d 975 (1985). Here, petitioners questioned Lyles about benefits she had received from the government. It was unnecessary and improper for the prosecution to expand on that by also eliciting information about being in protection. However, the prosecution did not dwell on the fact that Lyles and Nellum were provided with protection. The few references made did not rise to the level of a constitutional violation by so inflaming the jury that petitioners were deprived of a fair trial. The references to protective custody are not a basis for granting habeas corpus relief. *Cf. United States v. Caliendo*, 910 F.2d 429, 436 (7th Cir.1990); *United States v. Panas*, 738 F.2d 278, 285 (8th Cir.1984); *United States v. Blankenship*, 707 F.2d 807, 810–11 (4th Cir.1983).

Certain impeachment of Beatrice Mack, an alibi witness for Collins, is also alleged to be

12. Allegations of prosecutorial misconduct during the presentation of evidence are contained in Collins's petition. Most of the other prosecutorial misconduct claims are contained in both petitions. In any event, to the extent applicable, all arguments are considered as to both petitioners.

13. The question of waiver as to issues on which no arguments were presented to the Illinois Supreme Court will be considered separately.

14. "[T]he idea of 'invited response' is used not to excuse improper comments, but to determine their effect on the trial as a whole." *Darden*, 477 U.S. at 182, 106 S.Ct. at 2472.

prosecutorial misconduct. Cross examination of Mack as to the movie she saw on her first date with Collins and being a heroin addict then on methadone is characterized as collateral, and questioning her about a nose-ring that she did not wear while testifying is objected to as improper. The Illinois Supreme Court held that the trial court acted within its discretion in allowing in the allegedly collateral impeachment. *Collins I*, 478 N.E.2d at 281. As to the question about the nose-ring, to which an objection was sustained, the court stated: "We agree that the question was improper and showed a total lack of professionalism on the part of the assistant State's Attorney; however, we do not believe that it [was] so prejudicial as to deny the defendants a fair trial." *Id.* at 281–82.

[26–28] Errors regarding the admissibility of evidence are generally a matter of state law that are an insufficient basis for granting habeas corpus relief. *Estelle v. McGuire*, 502 U.S. 62, 67–68, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991); *Romano*, — U.S. at —, 114 S.Ct. at 2011; *Pierson*, 969 F.2d at 1389; *Gacy v. Welborn*, 994 F.2d 305, 316 (7th Cir.), *cert. denied*, — U.S. —, 114 S.Ct. 269, 126 L.Ed.2d 220 (1993). To support the granting of habeas relief, the evidentiary ruling must implicate a specific constitutional right or the evidence's undue prejudice so greatly outweigh its probative value and likely affect the trial outcome that the defendant was denied a fundamentally fair trial. *Pierson*, 969 F.2d at 1389. A witness's recall of events that occurred the day before the event pertinent to the charges and a witness's addiction to narcotics can be relevant to that witness's credibility. It does not exceed the bounds of the Constitution for a state court to hold that such impeachment was not excludable as collateral. Also, the prosecution's particularized questioning as to Mack injecting the heroin into her arms with needles did not add such undue prejudice to the addiction questioning that a constitutional error was present.

[29] As the Illinois Supreme Court correctly stated, the nose-ring question was improper and exhibited a lack of professionalism. However, there was only one question and it was immediately ordered to be stricken.[15] This question cannot be found to have caused significant prejudice and certainly does not support a constitutional claim.

[30] Sandra Johnson provided testimony regarding whether Collins's Cadillac was being used by him on the night of the murders. She had testified that she returned Collins's Chevrolet on November 11, prior to her going to Michigan. She testified that she was receiving public aid in Illinois and Johnson was also questioned as to whether the trip to Michigan was for the purpose of applying for public aid there. She denied that was the purpose of her trip and, in rebuttal, a police officer testified that she had told him that was the purpose of her Michigan trip. No objection was raised at trial and the Illinois Supreme Court held that the issue was waived for purposes of appeal. *Collins I*, 478 N.E.2d at 282. Even if this issue has not been waived for federal habeas corpus purposes, it fails to state any ground for granting relief. This evidentiary question of collateral impeachment does not rise to the level of a constitutional violation. Any prejudice would be minimal. Johnson was also impeached on the basis of convictions for three counts of robbery and one of misdemeanor theft.

4. Closing Arguments

[31] Collins complains that the prosecution made arguments as to Johnson that sought to link Collins to crimes committed by Bracy in Arizona. *See* C¶ 443. It is unclear how the prosecution argument linked Collins to the Arizona crimes. In any event, this issue was never raised in the state courts and no argument in support of it is made in response to respondent's motion to dismiss. *See* C Reply 23–30. This issue is waived.

[32] It was part of petitioners' defense that the murders had been committed by Nellum, Hooper, and "Jesse." The prosecution twice argued in closing that no prosecution witness had been questioned about Jesse. That was factually incorrect; Nellum had been questioned about Jesse. Objections were made to the argument and the court overruled the objections, but instructed the jury to rely on its recollection of the evidence. The prosecutor had also told the jury that his statements were not evidence. The jury was correctly instructed as to the law and had the opportunity to consider the prosecution's argument in light of the evidence presented at trial. Also, whether Nellum had been *asked* about Jesse was not a key fact, especially since he had denied having any knowledge of Jesse. The prosecution's misstatement of the evidence was not so prejudicial as to constitute constitutional error. *Cf. Donnelly*, 416 U.S. at 644, 94 S.Ct. at 1872; *United States v. Green*, 25 F.3d 206, 210 (3d Cir.1994); *Therrien v. Vose*, 782 F.2d 1, 4 (1st Cir.), *cert. denied*, 476 U.S. 1162, 106 S.Ct. 2285, 90 L.Ed.2d 727 (1986); *Girardin v. Pyle*, 752 F.Supp. 979, 982–83 (D.Col.1990), *aff'd by unpublished order*, 936 F.2d 582 (10th Cir.), *cert. denied*, 502 U.S. 919, 112 S.Ct. 329, 116 L.Ed.2d 269 (1991). For similar reasons, the alleged mischaracterization of Lyles's testimony, *see* C¶ 469, is not constitutional error.

Petitioners also complain of arguments made by the prosecution in closing. The following arguments were made in the prosecution's initial summation, argued by assistant State's Attorney Owen. Hyman and O'Callaghan were both assistant State's Attorneys who testified at the trial.

> OWEN: You heard the evidence. You heard the rebuttal witnesses that we put on after they put on their cock and bull defense, that Bracy was with his sister. Do you think Lawrence Hyman came in and lied for me and Goggin? Do you think O'Callaghan lied for us? Do you think an attorney would put his license on the line for the likes of these two, Collins and Bracy? There is no way. We go to school for too long for that, to get up and perjure ourselves for those two guys, or against those two guys.[16]
>
> * * * * * *
>
> OWEN: The gun's in the lake; when Morris Nellum was on the witness stand he was cross-examined about the guns and he told you that he did in fact lie to the police. He said, "yes, I lied, I told the police I didn't know where the guns were." And you also heard that I interviewed Nellum a few hours later. Did you hear any questions about what Nellum told me about the guns? Did you hear anything about that at all? Did any lawyer for the defense ask that question? You see, I can't. That is improper for me, but they didn't because they didn't want to hear that.
>
> McDONALD: Objection, judge.
>
> COURT: Overruled.
>
> McDONALD: That is improper argument.

Tr. 1285, 1288–89.

In his closing argument, Collins's attorney argued that testimony of assistant State's Attorney Dorfman (who did not prosecute the case) was inconsistent with Dorfman's written report. The defense attorney stated: "But they want Collins so bad, so bad that they made a guy come in here and tell you something that he knows is not in that report". Tr. 1333. Assistant State's Attorney Michael Goggin responded in the prosecution's rebuttal.

15. The prosecutor asked: "By the way, Miss Witness, I saw you in the hall and you had an earring in your nose isn't that correct?"

16. Although argued as error on direct appeal, no contemporaneous objection to this statement was made and the Illinois Supreme Court held that the claim based directly on this part of the summation was waived. *See Collins I*, 180 Ill.Dec. at 66, 67, 478 N.E.2d at 283. No response to the state's waiver argument was made by counsel on direct appeal, *see* Direct Appeal Reply 21–23, nor was any argument against waiver made on reconsideration, *see* Petition for Rehearing 18. On the postconviction appeal, no specific argument of ineffective assistance of trial or appellate counsel was made as to this issue. *See* Appellants' Postconviction Brief 18–19, 22–26. *See also Collins II*, 606 N.E.2d at 1143, 1144. Not having previously been presented to the state court, ineffective assistance of counsel cannot constitute cause. While this part of the prosecution's summation cannot directly be considered as a claim, it is part of the context of the other statements that must be considered in determining whether the other statements constitute grounds for granting relief. In the direct appeal, defendants argued that any question of Goggins's invited error must be considered in light of

GOGGIN: It is Mr. Owen and my duty to present the prosecution of this case. That is what we are paid to do. That is what we swore on oath to do when we were sworn in as assistant state's attorneys. It is the responsibility of Mr. Frazin to represent this killer and it is the responsibility of Mr. McDonald to represent this killer.

McDONALD: Objection.

COURT: Overruled.

GOGGIN: And for Mr. Frazin to stand before you just now and to accuse me of suborning perjury by bringing in Mr. Dorfman is disgusting. And if you think that I would jeopardize my license, my family, my children, my future, to put Mr. Dorfman on in a case and make him lie, well I say to you ladies and gentleman, we had better leave this system, and we had better all start taking on other responsibility. That is what—

McDONALD: Objection, this is improper argument.

COURT: Overruled.

Tr. 1335–36.

[33] The following arguments were also made by assistant State's Attorney Goggin in his rebuttal.

GOGGIN: You think about the fact that these two lawyers get up here and mimic and mock and demean you.

* * * * * *

GOGGIN: Let's talk about something, how Mr. McDonald misrepresents to you what the law is. You will hear about reasonable doubt. You will hear about beyond a reasonable doubt, and you will be told that is what the burden of proof is. And let me tell you something. That is the same burden of proof in every case that is tried in this courtroom, every case that is tried in this county, and every case that is tried in this country. It is beyond a reasonable doubt. The penitentiary is full of people like Collins and Bracy who have been proved guilty beyond a reasonable doubt, the Benny Weathers, the Derrick Phipps, the Roger Collins, the Murray Hoopers, and the Bill Bracys are convicted daily beyond a reasonable doubt. There is no mistake about that. Nothing at all.[17]

Tr. 1338, 1343.

Petitioners also point to additional statements made by the prosecution in its closing argument, but which were not raised as errors in the direct appeal to the Illinois Supreme Court. Therefore, by themselves, they cannot be grounds for granting relief. However, since prosecutorial misconduct must be evaluated in the context of the entire record, the additional statements are still relevant for evaluating the claimed errors that have not been waived.

OWEN: I mean, Morris Nellum got on the witness stand and said he was not the murderer, he told you that, and I'm the one, along with Eagen and Hyman who made the decision in this case, and we will live with this decision, and the decision was to use him as a witness against the killers, Cochise, Bracey, and Hooper, who by the way will be tried by Goggin and myself.

* * * * * *

OWEN: We have got the guns because we went out of our way, we went out of our way in this case because these two guys have to be taken off the street. We went out of our way and hired a professional diving service, and lo and behold they found the guns. Thank God they did.

* * * * * *

GOGGIN: ... They asked you to think about the fact that Morris Nellum lied about where the guns were. And let me tell you something, ladies and gentlemen, they didn't ask about any other questions and answers in these 13 pages? They didn't do that, did they, ladies and gentlemen? Why didn't they do that? What do you think is contained in these 13 pages?

Owen's statement in the initial summation. *See* Direct Appeal Reply 23.

17. Petitioners also contend that this statement constitutes grounds for relief because it misstates the government's burden of proof. States have leeway in defining what is meant by reasonable doubt. Even ignoring that this argument was not the definition of reasonable doubt contained in the jury instructions, this description of the reasonable doubt standard does not approach constitutional error. *See Victor v. Nebraska*, — U.S. —, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994).

What names do you think are mentioned in these 13 pages, and this was taken three to four hours before Owen got to Area One, before Owen accepted his responsibility on that weekend and came to Area One and talked to Hooper and talked to Nellum and decided to offer Nellum a deal....

* * * * * *

GOGGIN: Let's talk about apartment 206. Last Wednesday when you were in the back this man (indicating), this professional killer took the stand and when he took the stand he did not know that I had this photograph (indicating)—

FRAZIN: Objection.

GOGGIN: People's exhibit No. 27.

FRAZIN: Objection.

COURT: Overruled.

GOGGIN: He did not know that our evidence technician when they recovered these ropes took photographs of that apartment and he took this witness stand and he testified in this case, and he testified—

McDONALD: I vigorously object to him talking about testimony taken outside the presence of the jury.

COURT: Well, that will be sustained.

* * * * * *

GOGGIN: What motive does Morris Nellum have? What reason does he have? What in his background is there that would make him come in and testify that Collins is a killer and that Bracy is a killer? What was there in his background that would make him lie about that, if he is lying? What did Collins do to him What did Bracy do to him? What did Hooper do to him? Nothing. There is no reason for him to lie. What reason is there for O'Callaghan and Hoke and the whole bunch of people at Area One to stop investigating the case and let the real killers go? What reason is there for Owen and me to sit here and let the real killers stalk the streets. What reason? There is none.

Tr. 1290, 1300, 1337, 1340–41, 1353.

[34] Reference to facts not in the record is improper. *United States ex rel. Shaw v. De Robertis*, 755 F.2d 1279, 1281 (7th Cir. 1985); *Floyd v. Meachum*, 907 F.2d 347, 355–56 (2d Cir.1990). Here, in the initial summation, Owen made reference to his interview of Nellum, possibly implying that Nellum told him additional consistent information, thereby seeking to bolster the credibility of Nellum's testimony. However, whatever Nellum may have told Owen was not part of the evidence in the case. A defense objection to some of the argument by Owen was sustained.

[35] The prosecutor grouped together himself, the other prosecutor, and the two testifying assistants, implying they were a team of honest persons and thereby personally vouching for the credibility of the testifying assistants. On rebuttal, Goggin referred to his oath as an assistant State's Attorney and argued, "And if you think I would jeopardize my license, my family, my children, my future, to put Mr. Dorfman on in a case and make him lie, ..." Defense objections were overruled. Just as relying on evidence outside the record can violate the Constitution, *see Shaw, supra*, vouching for the credibility of evidence involves some of the same problems in that the prosecutor's statements are not subject to cross-examination. *See United States v. Robinson*, 8 F.3d 398, 415 (7th Cir.1993); *United States v. Phillips*, 527 F.2d 1021, 1024 (7th Cir.1975). *Phillips* is a direct review case which indicates that the prohibition on arguing personal belief is "elemental and fundamental." *Id.* (quoting *Greenberg v. United States*, 280 F.2d 472, 475 (1st Cir.1960)). Other courts have recognized that a prosecutor's personal vouching for the credibility of evidence is a claim cognizable on federal habeas corpus review. *See, e.g., Floyd*, 907 F.2d at 354. However, the remarks being improper is not sufficient; relief will not be granted unless so inflammatory and prejudicial that the trial is unfair and unless the statements likely changed the outcome of the trial. *See* § III(C)(2) *supra*.

[36] The Illinois Supreme Court held that the rebuttal argument about jeopardizing Goggin's license, etc. was invited error. *See Collins I*, 478 N.E.2d at 284. The Illinois Supreme Court ignored that arguments about challenges to the prosecutors' integrity

and a personalized response thereto were first raised by the prosecution in its initial summation. However, no objection was made to this statement. Defense counsel then went further and implied the prosecuting attorneys had knowingly solicited perjured testimony from their colleagues. Goggin's comments in rebuttal were a direct response to the accusation made against him. Goggin's comments were unnecessary and improper, but were not so inflammatory and prejudicial as to deny petitioners a fair trial. The jury was not prevented from fairly considering the credibility of the witnesses.

The comment Owen made about the gun and his interview with Nellum was characterized by the Illinois Supreme Court as "one that would have been better left unsaid." *Collins I*, 478 N.E.2d at 284. The Illinois Supreme Court held that there was "but a fleeting reference to this subject" and held that the comment could not be held to be reversible error viewed in light of the other evidence. *Id.* This court agrees.

[37] In his rebuttal, Goggin refers to the 13-page statement of Nellum that was not before the jury and implies that this statement bolsters Nellum's credibility. At another point, Goggin argues about testimony at a voir dire outside the jury's presence, but the court upheld an objection to this argument. The prosecution made a number of statements putting forth the theory that it was the defense attorneys' duty to defend guilty killers and, consistent with their duty, they sought to lie to the jury and mock and demean the jury. The prosecution also made a number of statements that they would not be prosecuting the case or presenting certain evidence if they did not personally believe the defendants had committed the crime and Nellum was telling the truth.

None of these statements individually or taken together are so egregious or inflammatory as to constitute a due process violation. The jury was instructed that the attorneys' arguments were not evidence. The statements were not so extreme that it is likely the jury ignored this instruction. Moreover, the evidence in this case was so strong that it is not likely that the improper argument affected the outcome of the trial. The prosecution offered Nellum's eyewitness testimony. Although his credibility was questioned, there was substantial corroborating testimony. Other witnesses saw Collins at or near the apartment where the victims had been held. Nowell's testimony linked Bracy to one of the murder weapons. Further, the alibi evidence of both petitioners was weak due to the doubtful credibility of the alibi witnesses.

This is not a case like *Shaw*, 755 F.2d at 1281–85, where the prosecutor indicated that evidence not before the jury would show the defendant was guilty and jury questions indicated jury uncertainty about the defendants' guilt. This case is more like cases in which questioned remarks were held to be an insufficient basis for granting habeas corpus relief. *Cf., e.g., Gonzalez v. Sullivan*, 934 F.2d 419, 423–24 (2d Cir.1991); *Kennedy v. Dugger*, 933 F.2d 905, 914 (11th Cir.1991), *cert. denied*, — U.S. —, 112 S.Ct. 1518, 117 L.Ed.2d 654 (1992); *Bradley v. Meachum*, 918 F.2d 338, 343–44 (2d Cir.1990), *cert. denied*, 501 U.S. 1221, 111 S.Ct. 2835, 115 L.Ed.2d 1004 (1991); *Lundy v. Campbell*, 888 F.2d 467, 479–80 (6th Cir.1989), *cert. denied*, 495 U.S. 950, 110 S.Ct. 2212, 109 L.Ed.2d 538 (1990); *Shepard v. Lane*, 818 F.2d 615, 622 (7th Cir.), *cert. denied*, 484 U.S. 929, 108 S.Ct. 296, 98 L.Ed.2d 256 (1987). Petitioners are not entitled to relief based on the closing arguments of the prosecutors.

5. *Sentencing Phase Arguments*

[38] Petitioners also complain of prosecutorial misconduct during closing arguments of the sentencing phase. The same standard is applicable to both the guilt phase and the sentencing phase; the misconduct must so infect the sentencing proceeding with unfairness as to violate due process. *See Romano*, — U.S. at —, 114 S.Ct. at 2012.

[39] During his closing statement, which was short, Bracy's attorney made an emotional argument in which he stated his opposition to the death penalty and made reference to the commandment "thou shalt not kill" as being a reason not to impose the death penalty. In rebuttal, assistant State's Attorney Owen began as follows:

OWEN: Are you going to follow your oaths? Are you going to do what you raised your right hands and swore to do? Are you going to follow the law as it is going to be given to you by the judge—

McDONALD: This is improper—

OWEN: —and as you said you—

COURT: Overruled.

OWEN: Each and every one of you before you were accepted by both sides in this case was asked by the judge, "Could you in certain circumstances consider the imposition of the death penalty?" Every one of you twelve citizens said that you could and that you would.

You took an oath following that to follow the laws of the State of Illinois.

I'm not going to get up here and give you a sermon. I'm not going to preach. But I am going to comment on one thing that Mr. McDonald said. He said, "Thou shalt not kill."

I've heard that before. People in 1941 through 1945 killed in the name of their country—

McDONALD: Judge, I'm objecting to this argument—

COURT: Overruled.

OWEN: —in service to their country. Some of us went to Viet Nam and had to kill for this country, and I will be damned if anybody is going to tell me that what we did in Viet Nam or in any other war was a violation of the Fifth Commandment of the Bible.

McDONALD: Objection. This is entirely wrong—

COURT: Overruled.

OWEN: It is no more killing than what you ladies and gentlemen of the jury swore that you would do after we presented all of the evidence in this case.

To stand up here and tell you that if you in fact find that there are no mitigating factors, no mitigating circumstances sufficient enough to preclude the imposition of the death penalty, is a slap in every veteran's face.

McDONALD: Objection.

COURT: Overruled. He may argue, just as you argued.

Tr. 1644–46.

The Illinois Supreme Court held that the prosecution's argument was invited by defense counsel's argument. *Collins I*, 478 N.E.2d at 288. As was indicated by the Illinois Supreme Court, the prosecution's argument was a "bit dramatic." *See id.* However, the argument of Bracy's counsel was also a bit dramatic. Arguments about a jury's duty to follow law and presenting an analogy with fighting war were a response to defense counsel's reference to the Ten Commandments. Contrary to Bracy's argument, B Reply 32, the prosecution did not argue the jury should consider factors unrelated to mitigation or aggravation; it argued that the jury should follow the law which permits the imposition of the death penalty.[18] The argument as to war did not so infect the sentencing proceeding with unfairness as to violate due process.

The remaining claims based on sentencing phase arguments, C¶¶ 477–78, 480–84, are waived either because not objected to at trial, *see Collins I*, 180 Ill.Dec. at 66, 67, 478 N.E.2d at 283, or not raised on appeal and no claim of ineffective assistance of trial or appellate counsel has been adequately presented to the Illinois Supreme Court. *See* Appellants' Postconviction Brief 18–19, 22–26; *Collins II*, 606 N.E.2d at 1143, 1144. Having failed to adequately present claims of ineffective assistance of counsel to the state court, ineffective assistance of counsel cannot constitute cause for failing to present issues to the state court. *See Murray*, 477 U.S. at 488–89, 106 S.Ct. at 2645–46; *Morrison*, 898 F.2d at 1300.

For the foregoing reasons, none of the prosecutorial misconduct allegations state a basis for granting relief. Bracy Claims IV and XIV and Collins Claim III will be denied.

18. Even if it were true, as petitioners contend, that the argument invoked a factor irrelevant to aggravation or mitigation, a recent Supreme Court case indicates that presentation of evidence irrelevant to the sentencing determination is not, standing alone, a basis for finding constitutional error; the evidence still must violate some constitutional prohibition. *See Romano*, — U.S. at —, 114 S.Ct. at 2011.

D. Sufficiency of Evidence (B13, C4, C20)

[40] It is contended that the evidence was insufficient to find petitioners guilty of murder [19] and armed robbery. The convictions must be upheld if, viewing the evidence "in the light most favorable to the prosecution *'any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *Kines v. Godinez*, 7 F.3d 674, 677 (7th Cir.1993), *cert. denied*, — U.S. —, 114 S.Ct. 1314, 127 L.Ed.2d 664 (1994) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)). The entire transcript of the trial has been considered.[20] The Illinois Supreme Court's summary of the evidence that is quoted in § I *supra* is accurate and binding on this court.

1. Murder

[41] Petitioners argue that Nellum's testimony was essential to the State's case. They do not dispute that his testimony alone could be sufficient to uphold the conviction. "The testimony of one eyewitness, even if he is a member of the criminal class and has no intrinsic credibility, is enough to convict in the absence of contrary evidence, or of [grave] contradictions." *United States v. Velasquez*, 772 F.2d 1348, 1352 (7th Cir.1985), *cert. denied*, 475 U.S. 1021, 106 S.Ct. 1211, 89 L.Ed.2d 323 (1986). Nellum did not testify that he saw the actual shootings, but he was with the petitioners when they took the victims to where their bodies were found and participated in the disposition of murder weapons. Petitioners argue that all of Nellum's testimony could have been suggested by the police. That credibility question, however, was for the jury. The alleged deficiencies and contradictions in Nellum's testimony were not so great as to make his testimony unbelievable to any rational trier of fact. His testimony was highly corroborated by weapons and physical evidence. Independent witnesses placed both Collins and Bracy in the presence of the victims. Also, an independent witness heard the shots fired. While this testimony was also subject to impeachment, it was again a question of credibility for the jury. Petitioners' alibi testimony was not convincing. The jury's finding of guilt is amply supported by the evidence.

2. Armed Robbery

[42] Petitioners also claim that the evidence was insufficient to support the armed robbery conviction. Assuming the merits of that claim, it is also claimed that the death sentence on the murder charges must be vacated because the armed robbery convictions were considered as aggravating factors.[21]

[43] The jury was instructed that the following elements of armed robbery had to be proven: "One, that the defendants, or one for whose conduct each is responsible, took money from the person or presence of Frederick Lacey, R.C. Pettigrew, or Richard Holliman; and two, that the defendants, or one for whose conduct each is responsible did so by the use of force or by threatening the imminent use of force; and three, that the defendants, or one for whose conduct each is responsible, was armed with a dangerous weapon." Tr. 1372 (People's Instruction 21, I.P.I.Crim. 14.02).

The following testimony of Nellum is relied upon as being the evidence supporting that

19. The insufficiency of evidence of murder claim is not expressly raised by Bracy. Collins's argument, however, is being considered as to both petitioners.

20. Information outside the record is not to be considered in determining the sufficiency of evidence. It will only be considered as the basis of some other independent claim, *e.g.*, the recantation claim, *see* § III(B) *supra*, or the *Brady* claim, *see* § III(P) *infra*.

21. Felony murder was one of four options for supporting the second element of the murder instruction. *See* Tr. 1366 (People's Instruction 16, I.P.I.Crim. 7.02). Since the aggravated kidnapping conviction also supported felony murder, vacating the armed robbery conviction clearly would not require vacating the murder conviction. Even if aggravated kidnapping were not an alternative, evidence of one or more of the three other alternatives for satisfying the second element would make vacating the armed robbery conviction harmless error as to proof of the second element of murder.

money was taken from one of the murder victims.[22] *See* CR 58–59.

On direct examination, Nellum testified as follows:

Q. Where was Bracy?

A. He was standing by the car too.

Q. Did you have any conversation with Bracy or did Bracy have a conversation with you at that time?

A. Well, he gave me a hundred twenty-five dollars.

Q. Who gave you a hundred twenty-five dollars?

A. Bracy.

Q. What did he say, if anything, when he gave you a hundred twenty-five dollars?

A. He just said "Here's a little something for you." And "Just be cool."

Tr. 514.

On cross-examination by Collins's attorney, Nellum testified as follows:

Q. Now, this deal that was going on in apartment 206 in the evening of November 12th, was it a robbery or something taking place?

A. I imagine so.

Q. Well, did you hear a conversation concerning a robbery, Mr. Witness?

A. No. It was all set up when I got there.

Q. You mean the deal to take these guys down, so to speak was already set up, right?

A. Yes.

Q. You knew you were going along with it, right?

A. Yes.

Q. For a piece of the action, right?

A. Yes.

Q. You were going along with the armed robbery, right?

A. I didn't know what they were doing.

Q. Well, you saw them being tied up, right?

A. I saw they were tied up after I got there.

Q. Did you figure they were going out for a view of the lake?

A. No, I didn't.

Q. So, you were willing at the time to take part in what looked like a robbery and could have been something more serious, is that right?

A. Yes.

* * * * * *

Q. Now, you telling us, Mr. Witness, that by the time you took Roger Collins's car and you got to the scene, why it was all over pretty much, wasn't it?

A. Yes.

* * * * * *

Q. But you just waited for Roger Collins to get back in the car and then, you drove back, right?

A. Yes.

Q. Not really having anything to do with anything?

A. Right.

Q. But you got a piece of the money?

A. Yes.

Q. Didn't give that back, did you?

A. Pardon me?

Q. You didn't give that back?

A. No, sir.

[Q. How much money did they take from those guys?

A. A hundred twenty-five dollars.

Q. How much money did you hear was taken total, Mr. Witness?

A. I didn't.

Q. Did you ever hear the figure eighteen hundred dollars?

A. Yes, I heard that.]

Q. Well, did you ask Collins, "How come I'm not getting more than this hundred twenty-five dollars?"

A. No I didn't.

Q. You figure that was enough just for your little part, not really having anything to do with it, right?

22. The bracketed portion of the testimony is hearsay that was challenged on direct appeal.

A. You could say that.

Tr. 538–39, 542, 543–44.

On cross-examination by Bracy's attorney, Nellum testified as follows:

Q. Now, you told us, meaning the Court and jury that you were given a hundred twenty-five dollars by Bracy?

A. Yes.

Q. Where were you given this money?

A. In the parking lot.

Q. Before you took the guns and dumped them in the lake, is that right?

A. Right.

[Q. You recall being asked this question by the police.

"Q. Now there was an amount of money taken after these guys were all shot. Do you know how much money was taken?

A. They told me eighteen hundred." Was that asked of you and did you answer?

A. It was asked.

Q. Did you make that answer?

A. Yes.

* * * * * *

Q. "Now there was an amount of money taken after these guys were all shot. Do you know how much money about was taken?"

That's exactly what's done here. Do you remember that question?

A. Right. Well, I, you know, like I said, I mean I told them what it was, what I thought.

Q. Well, did you see somebody going through the dead bodies for money, is that what you're telling us?

A. No.

Q. Did you see anyone take money from these people at any time?

A. No. I was told by Hooper how much money was taken.

Q. That's your old friend Hooper. When did he tell you that?

A. Well, it was later, after, you know, I had dropped him off at home, all this. He's always around. He and I talk a lot.

Q. I understand. So, you and Hooper, you drove Hooper home after you returned from the lake after you disposed of these guns, isn't that right?

A. This happened much later.

Q. How much later?

A. I didn't find out how much money was involved until much later. Something like months.

Q. Oh, months?

A. Yeah.]

Tr. 554–56.

The Illinois Supreme Court recognized that the testimony that Hooper told Nellum about the $1,800 was necessary to prove the armed robbery charge and also recognized that this testimony was hearsay. *See Collins I*, 478 N.E.2d at 277–78. The court held that the hearsay evidence was elicited by defendants and no objection was made to it and therefore it could be considered by the jury and supported the armed robbery conviction. Petitioners present no argument that it is a constitutional violation to consider hearsay evidence. This court is bound by the Illinois Supreme Court's evidentiary ruling. Whether the amount was $125 or $1,800 or more is not the issue. The defendants were involved in an armed robbery with the assistance of Nellum who received $125 from the proceeds of the robbery after the murders. There is sufficient evidence to support that money was taken from the victims.

For the foregoing reasons, Bracy Claim XIII and Collins Claims IV and XX will be denied.

E. Illegal Search (C5)

[44] Collins moved to suppress the introduction of certain photographs. He contended that the photographs were taken from his apartment without a search warrant. A police officer testified that he found the photographs in garbage on Collins's back porch. The trial judge credited the police officer's testimony and denied the motion to suppress. That ruling was affirmed on direct appeal. *Collins I*, 478 N.E.2d at 278–79. Fourth Amendment claims are not cognizable on a federal habeas corpus petition if, as here, the state has provided a full and fair opportunity

to litigate the issue. *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976).

[45] Collins argues that Judge Maloney was a corrupt judge who took bribes from defendants, but who automatically ruled in favor of the state if no bribe was being paid by the defendant. In accordance with this argument, Collins contends that he did not have a full and fair opportunity to litigate his motion to suppress. Proof of a biased tribunal would be a basis for this court considering Collins's Fourth Amendment claim. *See United States ex rel. Conroy v. Bombard*, 426 F.Supp. 97, 109 (S.D.N.Y.1976) (citing Bator, *Finality in Criminal Law & Federal Habeas Corpus Review for State Prisoners* 76 Harv. L.Rev. 441, 456 n. 26 (1963)). The Judge Maloney corruption claim is considered in § III(L) *infra*, where it is held to lack merit. Therefore, there is also no basis for considering the Fourth Amendment claim. Collins Claim V will be denied.

F. A Judge's Wife on Jury—Discovery and a Hearing (B3, B17, C6–8)

One of the jurors in this case was Dorothy Downing ("Downing"), the wife of former Cook County Circuit Court judge and Illinois Appellate Court justice, Robert Downing ("Judge Downing"). In 1970, Judge Downing sentenced Bracy to 12 to 36 years in prison for an armed robbery conviction committed after the escape from the penitentiary and before he was apprehended. During voir dire, Downing stated that her husband being a judge would not cause her to favor one side or the other and that she could be impartial.

No party objected to Downing serving on the jury. During the trial, anticipating impeachment of Bracy, Bracy's counsel brought out Bracy's three prior armed robbery convictions in 1965, 1970, and 1975 on Bracy's direct examination. In questioning Bracy about the pertinent armed robbery conviction, Bracy's counsel mentioned Judge Downing's name together with the names of two other sentencing judges and the length of the terms imposed, 8–20, 12–36, and 6 years. Mrs. Downing and the other jurors heard that Judge Downing sentenced Bracy in the 1970 case. At the time this evidence was presented, neither defendant objected. Bracy was paroled in 1979.

Collins complains that revealing that Judge Downing sentenced Bracy, was prejudicial to him as well. Collins revealed, on direct examination by his attorney, that he was convicted of six armed robberies in 1966 and given 4–10 and 10 year sentences and convicted of four armed robberies in 1974 when he received a 10 year and a 10 year and a day sentence. Collins was released on parole in May 1980.

Since no objections to Downing's selection for the jury were raised, the Illinois Supreme Court held that objections to her selection were waived. *Collins I*, 478 N.E.2d at 282. *See also Collins II*, 180 Ill.Dec. at 63, 606 N.E.2d at 1140. However, on direct appeal, the Illinois Supreme Court also considered whether it was ineffective assistance of counsel to permit Downing to serve on the jury and to present evidence that her husband had previously sentenced Bracy. The Illinois Supreme Court held that the record did not show that permitting Downing on the jury was unreasonable and therefore failure to object to her selection could not constitute ineffective assistance of counsel. *Collins I*, 478 N.E.2d at 283. It also held that bringing out Judge Downing's name was an error of judgment on the part of defense counsel, but that it did not support an ineffective assistance of counsel claim because there was not a reasonable probability that the error affected the outcome of the trial. *Id. See also Collins II*, 180 Ill.Dec. at 64, 606 N.E.2d at 1141.

In his brief, Bracy does not contend that it was error to initially allow Downing to sit on the jury. However, he contends that, once it was revealed Judge Downing had previously sentenced Bracy, it was error to permit the trial to continue with Downing on the jury. *See* B Reply 9–11. Respondents contend this issue is waived, but Bracy argues that the Illinois Supreme Court never made a clear statement that it was waived. *See id.* Alternatively, Bracy argues trial counsel provided ineffective assistance of counsel. *Id.* at 14–16. Apparently adopting Bracy's argument as to the merits, the focus of Collins's argu-

ment is on waiver and the question of whether the state provided adequate opportunity to prove that petitioners were prejudiced by Downing sitting on the jury. Gollins argues that postconviction counsel should have been provided funds to hire an investigator and the opportunity to investigate whether having Downing on the jury and bringing out the Judge Downing sentencing had an effect on the outcome of the trial. *See* C Reply 39–40.

On direct appeal, petitioners made the argument that Bracy primarily advances. *See* Direct Appeal Appellants' Brief 66–68. They argued that the constitutional right to a fair trial, including the right to an impartial tribunal, was violated by permitting Downing to sit on the jury after evidence came out that Judge Downing had previously sentenced Bracy. It was also argued that the attorneys provided ineffective assistance of counsel. *Id.* at 68. The state argued that no objection was raised during the trial and that petitioners motion for a new trial did not allege any prejudice as a result of Downing's service. *See* Direct Appeal Appellee's Brief 74.

The Illinois Supreme Court held as follows on this issue:

> Defendants next argue they were denied a fair trial because one of the jurors was the wife of a judge who previously sentenced Bracey to prison. During *voir dire* it was learned that Dorothy Downing was the wife of Justice Robert Downing of the Illinois Appellate Court and that Justice Downing had previously served as a criminal court judge in the circuit court of Cook County. Mrs. Downing stated, however, that although her husband was a judge, it would not cause her to favor one side or the other, and she assured the court that she could be impartial. The record reveals that defense counsel possessed Bracey's conviction record which showed that in 1970 Judge Downing sentenced Bracey to 12 to 36 years in prison for armed robbery. Despite this fact, no objection was raised to Mrs. Downing being sworn in as a member of the jury, nor was any allegation of prejudice asserted in defendants' written motion for a new trial. The failure to challenge a juror for cause or by preemptory challenge waives any objection to that juror. [Citation omitted.] Here the jury was duly accepted by the defendants; they cannot now be heard to complain that they were denied a fair trial.

Collins I, 478 N.E.2d at 282.

On postconviction appeal, petitioners argued that they were deprived of a fair and impartial jury by Downing's presence on the jury. *See* Postconviction Appellants' Brief 14–16. Although not as specific as the direct appeal brief, in the postconviction appeal petitioners were at least arguing in part the effect of the Judge Downing sentence on the jury in light of Downing's presence on the jury. On the postconviction appeal, the Illinois Supreme Court held:

> The defendants first argue that they were deprived of a fair trial and an impartial jury by the presence on the jury of the wife of an appellate court judge who had sentenced one of the defendants in an earlier conviction when the judge was sitting on the circuit court.
>
> During *voir dire*, one of the venirepersons, Dorothy Downing, stated that she was the wife of an Illinois appellate judge sitting in the first district. She also stated that her husband had formerly been a judge on the circuit court of Cook County. When questioned by the trial judge in this matter, Downing stated that the fact that her husband was an appellate judge would have no effect upon her consideration of the defendants' case and that she could be fair and impartial. She was accepted by both counsel as a juror.
>
> No objection was raised to Downing's presence on the jury during trial. However, on direct appeal to this court, the defendants argued her presence on the jury was *per se* prejudicial, requiring that their convictions be set aside. This court concluded that the defendants had waived the issue for purposes of review.
>
> When a defendant has previously taken a direct appeal, all matters which were raised or which could have been raised on that direct appeal are *res judicata* in his subsequent post-conviction proceeding.... Although a dissent filed in *Collins I* made essentially the same argument that the defendants are now presenting to this court (see *Collins*, 106 Ill.2d at 289, 87 Ill.Dec. 910, 478 N.E.2d 267 (Clark, C.J., dissenting, joined by Simon, J.)), we recognize that the majority found the question of Downing's presence on the jury to have been waived by the defendants. Therefore, the issue is *res judicata*.

Collins II, 180 Ill.Dec. at 63, 606 N.E.2d at 1140.

[46] Petitioners presented on direct appeal the issue of permitting Downing to continue on the jury after her husband's role in Bracy's prior conviction had been revealed. This issue was fairly presented as a constitutional claim. Fairly presenting a claim on direct appeal will exhaust a claim and preserve it for federal habeas corpus relief even if the state court fails to expressly address the issue in its opinion. *Smith v. Digmon*, 434 U.S. 332, 333–34, 98 S.Ct. 597, 598–99, 54 L.Ed.2d 582 (1978). On direct appeal, the Illinois Supreme Court considered the issue in terms of allowing Downing to be selected for the jury. *See Collins I*, 478 N.E.2d at 282. Waiver of the continued presence on the jury issue is implied by the facts that (1) there was also no objection raised at the time the Judge Downing sentence was revealed by defense counsel; (2) the state argued that such waiver had occurred; (3) the opinion refers to the lack of "any allegation of prejudice asserted in defendants's written motion for a new trial," *id.*; (4) the dissent reached the issue, *id.*, 478 N.E.2d at 290; and (5) the only aspect of this claim addressed on its merits by the majority is the alleged ineffective assistance of counsel, which does expressly consider Mrs. Downing's continued presence on the jury, *see id.*, 478 N.E.2d at 283.

[47] Petitioners seek to invoke the presumption of *Harris v. Reed*, 489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989). However, that presumption only applies if the state court addresses the merits of the federal claim, while failing to clearly express reliance on a state default. *See Ylst v. Nunnemaker*, 501 U.S. 797, 802, 111 S.Ct. 2590, 2594, 115 L.Ed.2d 706 (1991) (quoting *Coleman*, 501 U.S. at 739, 111 S.Ct. at 2559). Here, on direct appeal, the majority did not address the merits of the claim in federal terms. Moreover, even if *Collins I* should be construed as simply failing to address the continuing presence on the jury issue, *Collins II*, 180 Ill.Dec. at 63, 606 N.E.2d at 1140, makes clear the presence on the jury issue was waived for failure to adequately present it to the trial court. Therefore, the continuing presence on the jury issue was defaulted due to failure to object at the time the Judge Downing sentencing evidence was introduced and by failing to adequately present the issue on the motion for a new trial. Thus, the issues regarding Downing's presence on the jury are only preserved as ineffective assistance of counsel claims.[23]

[48–50] In order to succeed on an ineffective assistance of counsel claim, it must be shown both that the attorney's performance was deficient and that the deficiency prejudiced the petitioner. *Lockhart v. Fretwell*, — U.S. —, —, 113 S.Ct. 838, 842, 122 L.Ed.2d 180 (1993); *Cuppett v. Duckworth*, 8 F.3d 1132, 1135 (7th Cir.1993) (en banc), *cert. denied*, — U.S. —, 114 S.Ct. 1226, 127 L.Ed.2d 571 (1994); *Patel v. United States*, 19 F.3d 1231, 1235 (7th Cir.1994). It is presumed that counsel performed competently and this presumption can only be overcome by "specific acts or omissions that fell outside the wide range of professionally competent assistance." *Patel*, 19 F.3d at 1235. The prejudice component requires satisfaction of two standards. First, the petitioner must have been prejudiced in the causal sense; there being a sufficient probability that the error affected the outcome. There must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Cuppett*, 8 F.3d at 1136 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)). Second,

23. On the direct appeal, it is indicated that petitioners failed to adequately allege prejudice to support their ineffective assistance of counsel claim. *See Collins I*, 478 N.E.2d at 283. However, the Illinois Supreme Court addressed the merits of the claim without clearly relying on a procedural default. *See id.* Therefore, the *Harris* presumption applies and the Downing ineffective assistance of counsel claims are not procedurally defaulted. Respondents do not contend otherwise. *See* CR 63–66.

even if the reasonable probability standard is satisfied, the prejudice component is not fully satisfied unless "the result of the proceeding was fundamentally unfair or unreliable." *Lockhart*, — U.S. at —, 113 S.Ct. at 842. A result will not be fundamentally unfair or unreliable unless the petitioner was "deprived of any substantive or procedural right to which the law entitles him." *Id.*, 113 S.Ct. at 844. *See also Durrive v. United States*, 4 F.3d 548, 551 (7th Cir.1993); *United States v. Springs*, 988 F.2d 746, 749 (7th Cir.1993).

Since allowing Downing to continue on the jury after her husband's prior relationship with Bracy was revealed is more serious than initially permitting her to be on the jury, only the former need be considered. There is no dispute that, as was held by the Illinois Supreme Court, *Collins I*, 478 N.E.2d at 283, the performance of counsel was "an error in judgment." Collins's attorney failed to object to introduction of that evidence. The Illinois Supreme Court held the error did not rise to the level of ineffective assistance of counsel because it held the prejudice component was not satisfied.

The right to a fair and impartial jury is guaranteed by the Sixth Amendment. *Hunley v. Godinez*, 975 F.2d 316, 318 (7th Cir. 1992). The question of Downing's alleged impartiality, therefore, implicates a fundamental right. If a reasonable probability of bias affecting the outcome of the trial can be shown, the fundamental fairness aspect of the prejudice component would be satisfied since the fundamental right to an impartial jury would have been denied.

[51–53] Whether a particular juror was biased generally is a factual question. *Hunley*, 975 F.2d at 318. On habeas review, this court must defer to factual determinations of the state court unless one of the exceptions listed in 28 U.S.C. § 2254(d) is satisfied. *Id.* This, however, does not preclude application of a conclusive presumption of bias where appropriate. *Id.* (quoting *Smith v. Phillips*, 455 U.S. 209, 223, 102 S.Ct. 940, 949, 71 L.Ed.2d 78 (1982)). Whether a juror's partiality may be conclusively presumed from the circumstances is a question of federal law on which this court does not defer to the Illinois courts. *Hunley*, 975 F.2d at 318–19.

[54] Bias will only be presumed in extreme and exceptional circumstances. *Hunley*, 975 F.2d at 319. "[C]ourts have been inclined to presume bias in 'extreme' situations where the prospective juror is connected to the litigation at issue in such a way that is highly unlikely that he or she could act impartially during deliberations." *Id.* The connection may be through a close relative. *See Smith v. Phillips*, 455 U.S. at 222, 102 S.Ct. at 948; *Tinsley v. Borg*, 895 F.2d 520, 528 (9th Cir.1990), *cert. denied*, 498 U.S. 1091, 111 S.Ct. 974, 112 L.Ed.2d 1059 (1991).

[55] No case has been found involving a connection to a judge who had presided over a prior criminal case against a defendant. In one case, the wife of the judge trying the case sat on the jury for that case. Neither the prosecution nor the defendant objected to her being on the jury and there was no evidence of actual bias or effect. The appellate court, however, held that the fundamental right to an impartial jury was violated and that actual prejudice need not be shown. *People v. Hartson*, 160 A.D.2d 1046, 553 N.Y.S.2d 537, 538–39 (1990). This holding relied in part on the interests of the "public at large" in an impartial judicial system, not just the defendant's individual right to an impartial trial. Other cases involving relatives of jurors include the following: *United States v. Bynum*, 634 F.2d 768, 771 (4th Cir.1980) (convictions reversed on ground that one of the jurors, in response to a direct question asked during *voir dire*, had failed to reveal that he had a brother, sister-in-law, and nephew who had been convicted of criminal offenses); *United States v. Eubanks*, 591 F.2d 513, 517 (9th Cir.1979) (court presumed that juror whose sons were currently imprisoned for heroin-related crimes could not remain impartial during heroin conspiracy trial); *United States v. Caldwell*, 543 F.2d 1333, 1347 (D.C.Cir.1974), *cert. denied*, 423 U.S. 1087, 96 S.Ct. 877, 47 L.Ed.2d 97 (1976) (no presumption of bias because related to police officer); *Brown v. United States*, 356 F.2d 230, 233 (10th Cir.1966) (prejudice could not be presumed by fact that juror in murder trial had a brother who had been murdered); *Scott v. Ball*, 595 So.2d 848, 851 (Miss.1992) (in civil case, it was not abuse of discretion to refuse to excuse for cause a woman whose son had once been treated by the defendant doctor accused of malpractice); *Herman v. State*, 396 So.2d 222, 227 (Fla.App.), *cert. dismissed*, 402 So.2d 610 (Fla.1981) (bias of grand juror would not be presumed based on fact she was married to head of detective bureau that investigated charged crime). *See also Smith v. Phillips*, 455 U.S. at 222, 102 S.Ct. at 948 (O'Connor, J., concurring) (example of "an extreme situation that would justify a finding of implied bias ... might include ... that the juror is a close relative of one of the participants in the trial or the criminal transaction").

There was no dispute in this case that Bracy had been convicted of armed robbery and previously sentenced on that conviction. Indeed, each defendant had an extensive criminal record. Each defendant brought his criminal record before the jury. There was also no question raised as to the fairness of that prior sentence nor any evidence introduced as to possible sentences that could have been imposed for that conviction. Petitioners contend that Downing can be presumed to have recognized that this was a stiff sentence for armed robbery and therefore would have recognized that her husband had previously determined that Bracy was a bad person deserving of heavy punishment. It is contended that it is highly unlikely that Downing would have been able to put those thoughts aside and fairly evaluate the questions of guilt and punishment. It is also contended that, knowing she was the wife of a judge who had previously sentenced one of the defendants, other jurors may have deferred to her views.

It cannot be held as a matter of law that Downing's knowledge that her husband had previously sentenced Bracy to a lengthy term was highly likely to have influenced her decision. She had no knowledge of the armed robbery case other than the length of sentence imposed. In the case before her, she had lengthy testimony from which to decide the merits. There is no contention that knowledge of prior convictions and sentences thereon are themselves unduly prejudicial in this case. The additional knowledge that one's own husband had presided in one such proceeding does not turn such evidence into evidence that is highly unlikely to permit the juror to remain impartial.

Although, in retrospect, mentioning the name of Judge Downing in connection with one of Bracy's armed robbery sentences was seen to be an error, when that fact is considered together with all other evidence and the other convictions and records of the defendants, its significance pales and was not such as to constitute good cause for discovery and hearing on the effect of such information on the deliberations of the jury.

This court is bound by the factual findings of the Supreme Court of Illinois which are supported by the record. 28 U.S.C. § 2254(d). That court carefully considered the possible impact of the identification of Judge Downing and concluded that what it described as an "error of judgment" was not ineffective assistance of counsel. *Collins I*, 478 N.E.2d at 283. This court agrees. Accordingly, discovery and an evidentiary hearing with respect to this matter is not appropriate.

Bracy Claims III and XVII and Collins Claims VI, VII, and VIII will be denied.

G. Ineffective Assistance of Counsel
(B9, B16, C9–12, C27)

Ineffective assistance of counsel is claimed at all stages of the case: pretrial, guilt phase, sentencing phase, on appeal, and postconviction proceedings. Generally, these claims have been addressed in discussing the merits of the underlying error. To the extent they are not expressly discussed, it is because the underlying action was directly addressed and therefore ineffective assistance of counsel in permitting the error to occur need not be separately addressed. Any other ineffective assistance of counsel claims that are not expressly discussed have been waived because never presented to the Illinois courts.

There is no right to counsel in postconviction proceedings and therefore there can be no ineffective assistance of postconviction counsel claim that is cognizable in federal habeas corpus proceedings and the deficiencies of postconviction counsel cannot constitute cause for failure to present other inef-

fective assistance of counsel claims to the Illinois courts. *Coleman*, 501 U.S. at 752–57, 111 S.Ct. at 2566–68; *Jenkins*, 8 F.3d at 508; *Williams v. Chrans*, 945 F.2d at 932–33; *Bonin*, 999 F.2d at 429.

H. Death Qualified Jurors (B1, C13, C14)

[56] Petitioners complain that the jury was conviction prone because venirepersons who stated they could not impose the death penalty were excluded from the jury. That claim is without merit; such a person may properly be excluded from the jury. *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); *Witherspoon v. State of Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[57] Petitioners also complain that a particular venireperson was excused for cause on the ground that he could not impose the death penalty. Petitioners contend that the record does not adequately support this venireperson being excused.

After equivocating as to whether he could impose the death penalty, the venireperson's questioning finished with the following questions and answers.

Q. [Court] It might be difficult for everybody, but the question is can you do it?

A. I don't know, Your Honor.

Q. Well, we'll have to know whether you can consider it or you would not consider it under any circumstances.

A. Well, I would weigh the circumstances, if that's what you mean. I'd consider it in terms of the evidence.

Q. Well, yes. Certainly. I mean would you consider it?

A. Well, let me put it this way. Again, I'm not one who is in favor of capital punishment.

Q. You don't have to be. If you would consider imposing it, if the circumstances warranted it in the view of you and all the other jurors.

A. Well, if I'm not in favor of capital punishment, I don't see how I could very well, in any circumstance feel comfortable about considering it.

Q. Then, are you saying you could not consider it?

A. That's probably true.

Q. Then you're excused for cause.

Tr. 265–66.

[58] In a capital case, a juror may be excluded for cause if his or her "views would 'prevent or substantially impair' the performance of his duties as a juror in accordance with his instructions and his oath." *Witt*, 469 U.S. at 424, 105 S.Ct. at 852 (quoting *Adams v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 2526, 65 L.Ed.2d 581 (1980)). There is no requirement that a juror's bias be shown with "unmistakable clarity." *Id.*, 469 U.S. at 424–26, 105 S.Ct. at 852–54. As the Supreme Court noted, "many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakenly clear;' these veniremen may not know how they will react when faced with imposing the death sentence, or may wish to hide their true feelings." *Id.*, 469 U.S. at 424–25, 105 S.Ct. at 852–53. Additionally, factual findings as to a juror's ability to follow instructions in light of his or her views on capital punishment are findings of fact to which deference is owed pursuant to 28 U.S.C. § 2254(d). *Id.* at 429, 105 S.Ct. at 854.

Here the venireperson was carefully questioned. *See* Tr. 263–66. His responses were equivocal and indicated his doubts as to whether he could participate in deciding a capital case. In the end, he answered that it was "probably true" that he could not consider it. The record supports the state court finding that the venireperson was not capable of applying the death penalty. *See Collins I*, 478 N.E.2d at 286.

Bracy Claim I and Collins Claims XIII and XIV will be denied.

I. Denial of Continuance for Sentencing Hearing (B11, C15)

The jury returned verdicts of guilty on the evening of July 29, 1981. Petitioners requested a one-day continuance before the sentencing phase began. That motion was denied and a hearing was set for the afternoon of July 30. On July 30, petitioners moved for a two-week continuance. That motion was denied and a hearing was held at which petitioners were found eligible for the death penalty. The second phase of the death penalty hearing was conducted on July 31. Prosecution witnesses were cross-examined, but no witnesses were presented by either petitioner.

On direct appeal, the Illinois Supreme Court found that petitioners should have been aware prior to trial that the state might seek the death penalty if defendants were convicted. *See Collins I*, 478 N.E.2d at 287. The court also pointed out that, on appeal, petitioners failed to point to any additional evidence that would have been introduced had a continuance been granted. *Id.* In light of these facts, it was held that the trial judge did not abuse his discretion by denying a continuance. *Id.* Bracy also complained that he was not informed until after the trial had begun that evidence of a multiple murder he allegedly committed in Arizona would be used by the state during the sentencing phase. As of the time of his Illinois trial, the Arizona charges were pending, but had not been tried. During the pendency of the Illinois direct appeal, the Arizona charges were tried and Bracy was convicted. On appeal, the Illinois Supreme Court held no prejudice could be shown because, had it reversed on this ground, at the new sentencing hearing the Arizona conviction could be introduced which would be even more conclusive evidence of Bracy's commission of the Arizona murders. *Id.* at 286–87. In the postconviction proceeding, petitioners made the related argument that counsel provided ineffective assistance of counsel by failing to present mitigating evidence. That claim was denied on the ground that petitioners did not point to any mitigating evidence that would have been presented had counsel performed adequately. *Collins II*, 180 Ill.Dec. at 65, 606 N.E.2d at 1142.

[59] In his federal habeas corpus petition, Collins still fails to point to any mitigating evidence that he would have presented had a continuance been granted or had his counsel been effective. Therefore, his claims must fail for failure to allege any prejudice resulting from the denial of the continuance or from any ineffective assistance of counsel.

[60, 61] The Seventh Circuit has indicated that denial of a continuance could possibly support a due process claim that would be grounds for granting habeas relief. *Bell*, 861 F.2d at 170 ("In some circumstances such a ruling [denying a continuance to prepare for a witness] could be a denial of due process: if the witness was crucial to the prosecution and the defense needed time to develop evidence to counter his testimony."). Other circuits have discussed the issue in greater detail. In order to succeed on a habeas claim based on denial of a continuance, the petitioner must satisfy the ordinary abuse of discretion standard that would apply on direct review and the denial of the continuance must also have rendered the proceeding fundamentally unfair. *Manlove v. Tansy*, 981 F.2d 473, 476 (10th Cir.1992); *Conner v. Bowen*, 842 F.2d 279, 283 (11th Cir.), *cert. denied*, 488 U.S. 840, 864, 109 S.Ct. 107, 164, 102 L.Ed.2d 82, 135 (1988); *Hicks v. Wainwright*, 633 F.2d 1146, 1148 (5th Cir.1981). This analysis must be conducted in light of the need for a continuance and any actual prejudice resulting from the denial of the continuance. *Manlove*, 981 F.2d at 476. Also, resolution of this issue is a mixed question of law and fact; deference is owed to any state court findings of fact.[24] *Manlove*, 981 F.2d at 476.

Bracy, however, now points to mitigation evidence that he could have presented. He points to alibi witnesses and other exculpatory evidence presented at the Arizona trial. He also points to relatives of Bracy who could have testified to Bracy's difficult childhood and who could have also testified to their love for him and his value as a person. It is also claimed that prison personnel would testify to his model behavior while incarcerated. Bracy's claim requires further discussion.

24. The Eleventh Circuit has held that the question of whether the trial court abused its discretion is to be determined on the basis of the record before the court as of the time the continuance was denied. *Conner*, 842 F.2d at 283. Seventh Circuit law may allow facts occurring subsequent to the denial of the continuance to also be considered in determining whether an abuse of discretion occurred. *See United States v. Woods*, 995 F.2d 713, 716 (7th Cir.1993) (all the circumstances, including counsel's performance at trial are to be considered).

[62] Seventh Circuit law holds that there is no abuse of discretion in denying a continuance unless the denial was arbitrary and actual prejudice resulted. *United States v. Woods*, 995 F.2d 713, 716 (7th Cir.1993) (quoting *United States v. Withers*, 972 F.2d 837, 845 (7th Cir.1992)). The trial court is entitled to broad discretion on matters of continuances. *Woods*, 995 F.2d at 716; *United States v. Koen*, 982 F.2d 1101, 1114 (7th Cir.1992). This "does not mean no review at all. It simply means that we shall not second-guess the decision of a trial judge that is in conformity with established legal principles and, in terms of its application of those principles to the facts of the case, is within the range of options from which one could expect a reasonable trial judge to select." *Koen*, 982 F.2d at 1114. The following factors are "highly relevant in assessing claims of inadequate preparation time: the quantum of time available for preparation, the likelihood of prejudice from denial, the accused's role in shortening the effective preparation time, the degree of complexity of the case, and the availability of discovery from the prosecution." *Id.* (quoting *United States v. Studley*, 892 F.2d 518, 522 (7th Cir.1989)).

Respondent argues that Bracy has waived this claim for federal habeas corpus purposes because he failed to present the facts supporting prejudice to the Illinois courts. If the supporting facts are not adequately presented to the state court, a claim is waived absent a showing of cause and prejudice. *Keeney*, — U.S. at —, 112 S.Ct. at 1719. On direct appeal, Bracy failed to point to the mitigating evidence that he would have presented had a continuance been granted. The death penalty verdict was returned on July 31. Bracy was granted until August 24 to file posttrial motions. Therefore, even if investigation during the trial had not been possible, time was available to develop mitigating evidence that could have been presented in the motions for a new trial. Nevertheless, in his posttrial motion and direct appeal, Bracy failed to point to any additional evidence that he would have presented had he been granted a continuance.

[63] If the record could have been developed for the direct appeal, then Bracy can only succeed on his claim if he can show cause and prejudice for failing to develop the record on direct appeal. *Keeney*, — U.S. at —, 112 S.Ct. at 1721. Such cause and prejudice could be the ineffective assistance of trial and/or appellate counsel. However, to rely on such cause, that ineffective assistance of counsel claim must have first been fairly presented to the state court. *Murray*, 477 U.S. at 488–89, 106 S.Ct. at 2645–46; *Morrison*, 898 F.2d at 1300. No such claim, however, was fairly presented in the postconviction petition. Therefore, such a claim has not been preserved for use as cause in the present proceeding.

[64] Alternatively, if success on the denial of a continuance claim required the presentation of evidence outside the record, failure to adequately present it on direct appeal would not be a waiver. However, to preserve the claim for federal habeas corpus proceedings, it would have to be presented in the postconviction petition. This claim, however, was not made in the postconviction petition, nor were the facts supporting prejudice alleged in that petition.

[65] Even if Bracy's denial of a continuance claim has not been waived, it would fail on its merits. The record supports the Illinois Supreme Court's finding that counsel should have been aware prior to trial that this case would involve the death penalty. Prior to trial, counsel had the opportunity to speak to Bracy and his family to develop this evidence. There was no need for a continuance in order to have had an opportunity to present this evidence. *Cf. Smith v. Lane*, 794 F.2d at 292. Also, at least some of this evidence could have been prepared between the time the jury began deliberations on the merits and the time that the second phase of the sentencing hearing began. Furthermore, the trial judge was not informed that counsel wanted to develop this type of evidence. It was not an abuse of discretion to deny a continuance to develop this information.

Counsel was not informed of the nature of the Arizona charges until the Illinois trial had begun. However, the Illinois Supreme Court notes that Arizona witnesses were listed on a discovery response provided by the prosecution ahead of the trial. The Illinois Supreme Court focused on the prejudice component and held that it was not satisfied because any retrial would permit the introduction of even more damaging evidence, Bracy's actual conviction on the Arizona charges. *See Collins I*, 478 N.E.2d at 286. Bracy argues that the subsequent conviction is irrelevant to whether his trial, that occurred prior to this conviction, was fundamentally unfair. Alternatively, he contends that he still could have attempted to overcome this evidence with the substantial alibi evidence available to show he was in Chicago when the Arizona murders occurred. The subsequent conviction is relevant to determining whether defendant suffered actual prejudice. That a jury has found beyond a reasonable doubt that Bracy committed the Arizona murders supports that it is unlikely that he would have been able to convince the sentencing jury that his participation in those murders had not been proven. Bracy cannot satisfy the actual prejudice component of the denial of continuance claim.

[66, 67] Bracy still has the related claim of ineffective assistance of trial counsel in failing to present the mitigation evidence. That claim, which was raised in the postconviction proceedings, was denied on the ground that plaintiff failed to adequately demonstrate that any such evidence existed. *Collins II*, 180 Ill.Dec. at 65, 606 N.E.2d at 1142. Having failed to adequately present the facts to the state court, that claim is waived for federal habeas corpus purposes unless cause and prejudice is shown. *Keeney*, — U.S. at —, 112 S.Ct. at 1721. Postconviction counsel's ineffectiveness cannot constitute cause. *Coleman*, 501 U.S. at 752–57, 111 S.Ct. at 2566–68; *Jenkins*, 8 F.3d at 508; *Williams v. Chrans*, 945 F.2d at 932–33; *Bonin*, 999 F.2d at 429. Bracy also argues that the state's failure to provide adequate investigatory resources to the *pro bono* counsel representing Bracy in the postconviction proceedings constitutes cause. Just as there is no constitutional obligation to provide postconviction counsel, there is no constitutional obligation to provide such counsel with adequate investigative resources. Additionally, postconviction counsel would have had ready access to Bracy and his relatives. Presumably, he also could have obtained a transcript of the Arizona trial which would have revealed the mitigation evidence that Bracy presently relies upon.[25] Since not adequately presented to the Illinois courts, this ineffective assistance of counsel claim is waived.

For these reasons, Bracy Claim XI and Collins Claim XV will be denied.

J. Death Penalty Instructions (B15, C16–17)

Petitioners claim that the sentencing phase instructions were deficient. However, no claim of error in the instructions was raised on direct appeal and no claim of ineffective assistance of counsel in failing to present such a claim was made in the postconviction petition. Therefore, the claims based on the jury instructions are waived.[26]

[68] One of the jury instruction claims is that the instructions are inadequate to guide the jury, with 1990 and 1992 studies by Professor Hans Zeisel cited in support thereof.[27] The postconviction petitions were denied by the trial court in 1991, so there apparently

25. Also, as to the Arizona murder evidence, the prejudice component of ineffective assistance of counsel would not be satisfied just as the actual prejudice standard for the denial of continuance claim would not be satisfied.

26. In Claim XVI, Collins contends that the instructions as to burden of proof on aggravating and mitigating factors is unconstitutional. Respondent does not contend this claim is waived, instead treating it as a contention that the statute is unconstitutional because it lacks such a requirement, an issue that was raised on direct appeal. *See Collins I*, 478 N.E.2d at 288; CR 76–77. This claim is considered in § III(K) *infra*.

27. Collins indicated in his petition that he would subsequently provide a copy of the studies. C ¶ 737. However, neither party has provided a copy of the studies, which apparently are unpublished.

was an opportunity to present the first study in the postconviction proceedings. Even if this claim is not waived because the studies are newly discovered evidence which could not be presented to the Illinois courts because the time for filing a postconviction petition had already expired, *see Harris v. DeRobertis*, 932 F.2d at 621, the claim would fail. The Seventh Circuit has held that the Zeisel studies do not support a claim upon which habeas relief will be granted and, even if the studies did support a cognizable claim, such a claim would be a new rule for which *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), prohibits retroactive application. *Free v. Peters*, 12 F.3d 700, 703 (7th Cir.1993).

Bracy Claim XV and Collins Claims XVI and XVII will be denied.

K. Death Penalty Statute Unconstitutional (B12, C18–19, C21)

On various grounds, petitioners contend the Illinois death penalty statute, Ill.Rev. Stat. ch. 38 ¶ 9–1 (1977) (now codified as 720 ILCS 5/9–1) is unconstitutional. Only four grounds[28] were fairly presented to the Illinois Supreme Court. *See Collins II*, 606 N.E.2d at 1142–43. Additional grounds are contained in the federal habeas petitions. As to those grounds, no ineffective assistance of counsel claim was presented to the Illinois courts. Therefore, only the four claims presented to the Illinois Supreme Court have been preserved for federal habeas corpus review.

[69–73] There is clear authority contrary to the arguments advanced. The Illinois statute does not violate the Constitution by permitting the jury to consider nonstatutory aggravating factors. *Simmons v. South Carolina*, — U.S. —, —, 114 S.Ct. 2187, 2193, 129 L.Ed.2d 133 (1994); *Williams v. Chrans*, 945 F.2d at 939; *Silagy v. Peters*, 905 F.2d 986, 1000–01 (7th Cir.1990), *cert. denied*, 498 U.S. 1110, 111 S.Ct. 1024, 112 L.Ed.2d 1106 (1991). *See also Tuilaepa v. California*, — U.S. —, —, 114 S.Ct. 2630, 2638, 129 L.Ed.2d 750 (1994). The statute does not violate the Constitution by failing to provide for adequate appellate review. *Silagy*, 905 F.2d at 1000. Nor does the statute violate the Constitution by providing prosecutors with unfettered discretion in pursuing sentences of death. *Williams v. Chrans*, 945 F.2d at 938; *Silagy*, 905 F.2d at 993. The Illinois statute's provisions as to burdens of persuasion and weighing the factors to be considered are not unconstitutional. *See Tuilaepa*, — U.S. at ——–——, 114 S.Ct. at 2638–39; *Williams v. Chrans*, 945 F.2d at 936–37; *Silagy*, 905 F.2d at 998–99. Additionally, that Illinois law as to the burdens of persuasion may have changed over the years, *see Free*, 12 F.3d at 703, does not support an equal protection claim. *Del Vecchio*, 31 F.3d at 1386; *Bowser*, 20 F.3d at 1065–66.

Bracy Claim XII and Collins Claims XVIII, XIX, and XXI will be denied.

L. Trial by Judges who accepted Bribes, Discovery (B10, C24, C31)

Judge Thomas Maloney presided over petitioners' trial. In 1993, Judge Maloney was convicted of accepting bribes to acquit certain defendants. *See United States v. Maloney*, 1994 WL 96673 (N.D.Ill. March 23, 1994) (denying posttrial motions). This included accepting bribes in murder cases. Petitioners allege that, in order to cover up the fact that he accepted bribes from defendants in some cases, Judge Maloney was prosecution oriented in other cases, that is he tended to rule in favor of the prosecution, particularly on discretionary matters. Petitioners allege they were prejudiced by this in that many of the discretionary rulings in this case went against them. There is no allegation that Judge Maloney solicited bribes in petitioners' case. In Collins's supplemental motion for discovery, it is also stated that a government witness in the *Maloney* case informed Collins's present counsel that Collins's counsel at the state trial was a partner of Judge Maloney before he sat on the bench.

In a recently filed second supplementary petition, it is also alleged that Judge Michael Close, who presided over petitioners' post-conviction proceedings, has accepted bribes from defendants. It is alleged that the "allegations of improprieties concerning Judge Close must call into question whether or not proper discretionary rulings were made in Petitioner's case." C ¶ 820. There is no allegation that Judge Close solicited bribes from petitioners.

[74] Respondents contend that these claims were waived because not presented to the Illinois courts. The claim regarding Judge Maloney was raised for the first time in the reply brief of the postconviction appeal, which is when it first became public information. The Illinois Supreme Court declined to consider the claim. That the Maloney claims are based on newly discovered information constitutes cause for failing to raise it sooner. *See Murray*, 477 U.S. at 488, 106 S.Ct. at 2645. At the time the new information was first discovered, the time for filing a postconviction petition had already expired. *See* 725 ILCS 5/122–1. There being no direct precedent that the Illinois courts would excuse the delay, it is presumed that no remedy was still available in state court at the time the new evidence was discovered. *Harris v. DeRobertis*, 932 F.2d at 621. Cause exists for failing to present the Judge Maloney claim to the state courts.

[75] The Judge Close claim is different. The allegations of Judge Close's corruption incorporate newspaper articles. *See* C ¶ 820. As one of those articles states, the allegations against Judge Close first surfaced in 1985. That was before petitioners even filed their postconviction petitions. Therefore, cause does not exist for the delay in raising the Judge Close claim. *Cf. Cornell*, 976 F.2d at 380–81. That claim is waived.

[76, 77] The constitutional right to a fair trial includes the right to a trial judge who is neutral, detached, and free from bias. *Dyas v. Lockhart*, 705 F.2d 993, 995 (8th Cir.1983). Petitioners do not contend that bias can be presumed from the available facts. Instead, they argue that they need further discovery in order to obtain facts that would show the existence of actual bias. It is unclear how petitioners would make such a showing. At oral argument, it was suggested they would seek to prove Judge Maloney was tougher in cases where bribes were not paid. That, however, would be insufficient and is only a matter of speculation. As petitioners concede, they are presently incapable of succeeding on the Judge Maloney claims. They do not point to any particular adverse ruling that would have been favorable to them before another judge. Their attack is similar to the position of the petitioner with respect to possible bias of a trial judge rejected by the Court of Appeal, *en banc*, in *Del Vecchio*, 31 F.3d at 1372 (Easterbrook, J., concurring at 1388–91). The present allegations contain insufficient specificity or good cause to justify further discovery. *Cf. Deputy v. Taylor*, 19 F.3d 1485, 1493 (3d Cir.1994); *Munoz v. Keane*, 777 F.Supp. 282, 287 (S.D.N.Y.1991).

Bracy Claim X and Collins Claims XXIV and XXXI will be denied. Collins's supplemental motion for discovery is also denied.

M. Fabricated Rape Evidence (C25)

Collins claims that police reports indicate only one piece of rope was recovered from the apartment where the victims had been held. C ¶ 784. However, at trial, two pieces of rope were introduced into evidence. Petitioner contends one or both pieces of rope was fabricated evidence. There is no allegation that the police reports were unavailable at the time of trial. This claim was not presented to the Illinois courts, either directly or as an ineffective assistance of counsel claim. This claim is waived for federal habeas corpus purposes. Collins Claim XXV will be denied.

N. Severance (C26)

Collins complains that the trial court denied his motion to sever his sentencing hearing from that of Bracy. This argument is waived because not raised on direct appeal and no related ineffective assistance of counsel claim was raised in the postconviction proceedings. Collins Claim XXVI will be denied.

O. Nowell Impeachment Evidence (C28)

It is alleged that the prosecution failed to provide petitioners with information that could have been used to impeach Nowell. This issue was not raised in the Illinois courts and there is no allegation that knowledge of the additional impeachment was not discoverable until after the time for filing a postconviction petition had run. Petitioners, therefore, fail to show cause for failing to present this claim to the Illinois courts. The claim is waived. Collins Claim XXVIII will be denied.

P. Brady Claim Related to Nellum (C30, C37)

[78] Collins alleges that, in May 1993, he first obtained a copy of a January 28, 1981 police report that had not been provided to petitioners at the time of the trial. At that point, it was too late to file a postconviction claim, so petitioners would have cause for failing to present to the Illinois courts any issue based on the police report. Collins contends that this information would be *Brady* information that should have been disclosed by the prosecution. *See Brady v. State of Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). "A *Brady* violation occurs where the prosecution suppresses evidence that is favorable to the defendant and material to an issue at trial." *United States v. Carson*, 9 F.3d 576, 582 (7th Cir. 1993). Evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *United States v. Dweck*, 913 F.2d 365, 371 (7th Cir.1990) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985))).

Collins alleges that the report contains two pieces of material information. First, he alleges that it refers to only one piece of rope being found, not two. However, in Collins Claim XXV, *see* § III(M) *supra*, it is alleged that reports revealed there was only one piece of rope. There is no allegation that petitioners lacked access to these other reports at the time of trial. Therefore, having this fact included in an additional report cannot be considered a material fact, nor are the reports necessarily inconsistent as written. It is also alleged that a report reveals that Morris Nellum's fingerprints were found in Apartment 206 when it was searched on December 30, 1980. Apartment 206 was where the murder victims were held prior to being taken out to be shot. The fingerprint evidence would have supported petitioners' contention at trial that Nellum frequented Apartment 206. Nellum denied he lived there. This evidence would not necessarily establish impeachment. Nellum admitted that he had been in the apartment on and before November 12, 1980, and that a person by the name of Iron Mike lived there. However, even if the evidence would have resulted in additional impeachment of Nellum (who petitioners now accept as truthful) it could not be said to have an effect on the outcome of the trial.

Collins Claims XXX and XXXVII will be denied.

Q. Punishment Alternatives and Dangerousness (C32–36)

In a third supplemental petition, Collins raises claims regarding the issue of punishment alternatives and future dangerousness of he and Bracy.[29] It is complained that the prosecution made an argument that defendants would be a continuing danger to society if not put to death, but that the trial court refused to permit Bracy's counsel to point out that defendants would get life imprisonment without parole if not sentenced to death. This issue is raised substantively, as ineffective assistance of counsel at each level of the state court proceeding, and as an equal protection claim on the ground that other Illinois defendants have been permitted to point out that they would be subject to life imprisonment without parole. Since the issue of dangerousness (including related ineffective assistance of counsel or equal protection claims) was never presented to the Illinois Supreme Court, these claims are all waived.

[79] Even if considered on their merits, these claims would fail. In a recent Supreme Court case, the prosecution had made arguments that the defendant would be a danger to the *community* if not executed. The death sentences were vacated because the trial court had denied defendant's attempts to inform the jury that absent a death sentence, he would be sentenced to life without parole. *See Simmons v. South Carolina*, — U.S. —, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994). In the present case, the prosecution argued that petitioners would be dangerous to others at the *prison* or *if they escaped from prison* (Tr. 1649–50, 1653); there was never any argument that they would represent a danger if released or paroled from prison. Therefore, being a danger because released on parole was not an issue raised by the prosecution. Also, although the court sustained an objection to Bracy's counsel's reference to petitioners getting natural life or life imprisonment if not sentenced to death, Tr. 1636–37, no objection was made to Collins's counsel's statement that Collins would not be back out on the street in 5 to 10 years if not sentenced to death. Tr. 1642.

Since 1988, Illinois provides for jury instructions as to natural life imprisonment being the alternative to the death penalty, *see People v. Gacho*, 122 Ill.2d 221, 119 Ill.Dec. 287, 306–07, 522 N.E.2d 1146, 1165–66, *cert. denied*, 488 U.S. 910, 109 S.Ct. 264, 102 L.Ed.2d 252 (1988). However, this change in practice does not result in an equal protection violation, *see Del Vecchio*, 31 F.3d at 1386; *Bowser*, 20 F.3d at 1065–66.

Collins Claims XXXII, XXXIII, XXXIV, XXXV, and XXXXVI will be denied.

R. Involuntary Confession (B7)

At trial, Bracy was impeached with statements he made to police officers that he had been in the vicinity of Apartment 206 on November 12, 1980. Bracy now alleges that this statement to the police was involuntary in that he was beaten by the police. This claim was not raised in the state courts. Ineffective assistance of trial counsel cannot be cause because this ineffective assistance of counsel claim has not been presented to the state courts. *Murray*, 477 U.S. at 488–89, 106 S.Ct. at 2645–46; *Morrison*, 898 F.2d at 1300. Ineffective assistance of postconviction counsel cannot constitute cause. *Coleman*, 501 U.S. at 752–57, 111 S.Ct. at 2566–68; *Jenkins*, 8 F.3d at 508; *Williams v. Chrans*, 945 F.2d at 932–33; *Bonin*, 999 F.2d at 429. Bracy also relies on Nellum's recent deposition testimony as cause because it purportedly contains new evidence in that Nellum states he saw Bracy being beaten. However, Bracy himself would have known he was beaten, so Nellum's evidence was not needed in order to be able to know the facts necessary to bring the claim.

There being no cause for failing to present the claim to the state courts, Bracy Claim VII will be denied.

S. Impeachment with Silence (B8)

Bracy complains that he was impeached with the fact that, while being interrogated by an assistant State's Attorney, he had not stated that he spent the evening of the murders with his sister. Bracy contends that this constitutes a violation of his right to remain silent. This claim was not presented to the Illinois Supreme Court. Bracy contends that the ineffective assistance of appellate counsel constitutes cause. However, this ineffective assistance of appellate counsel claim was not fairly presented in his postconviction appeal. Therefore, it cannot constitute cause, *see Murray*, 477 U.S. at 488–89, 106 S.Ct. at 2645–46; *Morrison*, 898 F.2d at 1300, and Bracy Claim VIII is waived.

Bracy Claim VIII will be denied.

T. Loss of the Common Law Record

[80] Petitioners' postconviction attorney withdrew the common law record from the trial and has not returned it to the courts.[30] This court has ordered postconviction counsel to search for the record, and a rule to show cause is pending as to postconviction counsel. However, he has been unable to locate the missing record. The common law record has been partially reconstructed.

Petitioners refer to the possibility that finding the common law record could reveal additional errors that have not yet been raised. While it might reveal additional errors for petitioners to allege, it is not shown how it would reveal any errors on which relief could be granted. Petitioners have the briefs filed on the direct appeal. Any errors

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28. In the Illinois courts, they were presented as five grounds, but two of the grounds were found to be inverse statements of the same ground. *See Collins II*, 606 N.E.2d at 1143.

29. This claim was also alluded to in the original petition. *See* C ¶¶ 478, 480, 483.

30. The common law record from the postconviction proceedings is not missing.

not raised on direct appeal would be waived absent cause and prejudice. Since any additional errors that might be revealed by the common law record were not raised in the form of ineffective assistance of counsel claims in the postconviction proceedings, the cause standard would not be satisfied. *See Murray*, 477 U.S. at 488–89, 106 S.Ct. at 2645–46; *Morrison*, 898 F.2d at 1300.

In any event, the burden is on petitioners to show they are prejudiced by the missing records. *See Bransford v. Brown*, 806 F.2d 83, 86 (6th Cir.1986), *cert. denied*, 481 U.S. 1056, 107 S.Ct. 2198, 95 L.Ed.2d 853 (1987). Mere speculation about the potential for finding error is insufficient. *Cf. id.* Moreover, it is petitioners' own counsel who lost the record. He is petitioners' agent and they must bear the risk of that attorney's error. *Coleman*, 501 U.S. at 752–56, 111 S.Ct. at 2566–67.

IT IS THEREFORE ORDERED that:

(1) Petitioner Collins is granted leave to file three supplemental habeas corpus petitions in Case No. 93 C 5282. Petitioner's supplemental motion for discovery in Case No. 93 C 5282 [72–1] is denied. Petitioner's motions to order production of exhibits [60–1] and for protective order [61–1] in Case No. 93 C 5282 are denied.

(2) Respondent's motion to dismiss is granted.

(3) Petitioner's motion to conduct discovery in Case No. 93 C 5282 is denied.

(4) The Clerk of the Court is directed to enter judgment in favor of respondent and against petitioner denying the petitions for writ of habeas corpus in Case No. 93 C 5282.

(5) Respondent's motion to dismiss in Case No. 93 C 5328 is granted.

(6) Petitioner's motion to conduct discovery in Case No. 93 C 5328 is denied.

(3) The Clerk of the Court is directed to enter judgment in favor of respondent and against petitioner denying the petition for writ of habeas corpus in Case No. 93 C 5328.

1. Collins's supplement to his motion has also been considered.

MEMORANDUM OPINION AND ORDER ON MOTIONS TO ALTER OR AMEND

In the Circuit Court of Cook County, Illinois, Roger Collins and William Bracy were found guilty of murder and other charges and were sentenced to death. The convictions and sentences were affirmed on direct appeal and post-conviction relief was denied. In an order dated August 24, 1994 (the "August Order"), their federal petitions for writ of habeas corpus were denied. Pending are each petitioner's motion to alter or amend the judgment.[1] Also pending is Collins's motion for approval of expenditure of funds to conduct further discovery. The facts of the case are set forth in the August Order and familiarity with that opinion is assumed. Most of petitioners' contentions simply repeat arguments that have previously been considered and rejected. Only new arguments or arguments that were not sufficiently addressed in the August Order will be discussed.

[81] Collins contends in his brief that this court's reading of the entire transcript was insufficient to determine the sufficiency of the evidence because the court did not have the trial exhibits as well. When the motion was presented in court, counsel was asked what the missing exhibits were and was allowed time to provide them for the court's review. At the time the motion was presented in court, counsel referred to one photograph and stated that the exhibits were in the custody of the Cook County State's Attorney. No copy of that photograph nor any other exhibit was filed within the time allowed. The transcript was understandable without the exhibits and Collins does not point to any exhibit for which actual examination is necessary to determine the sufficiency of the evidence. The ruling on sufficiency of the evidence will stand.

[82] Collins has filed a request for approval of funds for his attorneys to travel to Arizona to directly examine documents accumulated by a private investigator for Bracy. The private investigator has primarily been investigating Arizona murder charges against Bracy, but also has information related to the Illinois charges against Bracy and Collins. Some of this information was previously considered. *See* August Order §§ III(B), III(L). Collins provides a statement of the types of documents the private investigator has. Most of it apparently relates to the Arizona charges. While generally describing the documents, Collins makes no specific allegations as to what facts could support a ground for relief. Collins has not shown good cause for permitting further discovery. *Cf. DeLong v. Thompson*, 790 F.Supp. 594, 616–18 (E.D.Va.1991), *aff'd by unpublished order*, 985 F.2d 553 (4th Cir. 1993).

Collins's motion for discovery also contains a transcript of May 1994 testimony of Attorney Greg Owen in the case of *Arizona v. McCall*. Owen was one of the prosecutors in the present case. Collins again points to inconsistencies regarding when Nellum informed the prosecutors of guns being in the lake. Those inconsistencies, however, came out at trial. As was previously held, they do not constitute grounds for relief. *See* August Order § III(C).

[83] Collins contends that it was recently discovered that Nellum had one or two prior convictions that were unknown to petitioners at the time of trial. The prior convictions were mentioned at a June 1991 sentencing hearing on other charges against Nellum. Collins does not explain how this alleged newly discovered evidence would support a claim upon which habeas relief could be granted. Newly discovered evidence that supports a person's innocence is not alone a basis for granting habeas relief. Deprivation of the evidence must also be a constitutional violation. *Herrera v. Collins*, — U.S. —, —, 113 S.Ct. 853, 860, 122 L.Ed.2d 203 (1993); *Bowman v. Armontrout*, 859 F.Supp. 369, 372 (W.D.Mo.1994). Furthermore, newly discovered impeachment evidence will not support habeas relief. *Bowman*, 859 F.Supp. at 372. There is no contention that the prosecution knew of these convictions at the time of the trial. This allegation of newly discovered evidence does not support a claim.

[84] Collins now clarifies that he is claiming that there is one police report indicating that only one piece of rope was recovered from the apartment where the victims had been held and that this report was not turned over at the time of trial. *See* August Order § III(M). But even assuming the recent discovery of the police report constitutes cause for failing to present this claim to the Illinois courts, there is no reasonable probability that petitioners could have both shown that the rope evidence presented at trial was fabricated and that such a showing would have resulted in their being found not guilty. Relief would not be granted on this new allegation.

All other issues raised in Collins's motion to alter or amend and the issues raised in Bracy's motion to alter or amend are adequately addressed in the August Order.

IT IS THEREFORE ORDERED that:

(1) In 93 C 5282, Collins's motion to alter or amend [85–1,2] and sealed motion for approval of expenditure of funds [91–1] are denied.

(2) In 93 C 5328, Bracy's motion to alter or amend [58–1,2] is denied.

Dated: November 4, 1994.

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, et al., Plaintiffs,

v.

Robert MILLER and Ida Miller, his wife, jointly and severally, Defendants.

No. 93 C 612.

United States District Court, N.D. Illinois, Eastern Division.

Oct. 18, 1994.

Multiemployer pension plan and its trustees brought suit against married couple

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS, Respondent,
vs
EARL HAWKINS
NATHSON FIELDS Petitioners.
Post-Conviction
No. 85 C 6555
85 C 7651

RULING ON PETITIONERS' MOTION FOR POST-CONVICTION RELIEF

Petitioners, Earl Hawkins and Nathson Fields, pursuant to Sections 122-1 et seq. of the Illinois Code of Criminal Procedure, 725 ILCS 5/122-1 et seq. (West 1994), seek to vacate the judgment of conviction entered against them in the above captioned matter on September 19, 1986. On that date, the petitioners were sentenced to death by lethal injection. Their sentences were imposed upon the court's earlier respective findings of guilty entered upon first degree murder. Ill. Rev. Stat. (1983), ch. 38, para. 9-1-A(1). The court imposed said sentences after: 1) the defendants waived their right to a jury at the first stage of the death penalty hearing, and the court found they were both eligible for the death penalty; and 2) a jury was empaneled to hear aggravating and mitigating circumstances, and concluded that there were no mitigating circumstances sufficient to preclude the imposition of death.

APPENDIX D

BACKGROUND

Petitioners, Earl Hawkins and Nathson Fields, were prosecuted for their participation in the murders of Jerome "Fuddy" Smith and Talman Hickman on April 28, 1984, in front of a Chicago Housing Authority (C.H.A.) apartment building located at 706 East 39th Street. Hawkins and Fields were members of the El Rukn street gang and Jerome Smith was the leader of the Black Gangsters Goon Squad street gang.

At trial, the State presented the testimony of six witnesses. Three of these witnesses claimed to have observed the shooting, two other witnesses were police officers and the remaining witness was an El Rukn. Defendant Hawkins was represented by William Swano. Defendant Fields also had a private attorney. The defendants called four witnesses who claimed that they observed the shooting. The defendants also called a Chicago police detective and a private investigator hired by William Swano.

Following closing arguments, Thomas J. Maloney found the defendants guilty of the murders of Jerome Smith and Talman Hickman. After the State moved for a death penalty hearing, the defendants elected to waive their right to a jury at the first stage of the proceeding. The court then found both defendants eligible based on their murder of two or more persons. A jury was thereafter empaneled to hear evidence in aggravation and mitigation. After the jury found there were no mitigating factors sufficient to

preclude the imposition of death, the trial court sentenced the defendants to death.

Notwithstanding contentions the defendants raised concerning the imposition of their death sentences, the crux of their direct appeal alleged that they were not proven guilty beyond a reasonable doubt.[1] In specific detail, the petitioners asserted that the State's witnesses gave inconsistent, contradictory and unbelievable testimony. Petitioners also alleged that the State's three occurrence witnesses were motivated to testify untruthfully by their rival gang affiliation.

The Illinois Supreme Court rejected the petitioners' argument and affirmed their sentences on February 16, 1990. **People v. Fields** (1990), 135 Ill.2d 18, 552 N.E.2d 791. While the Supreme Court noted that there were discrepancies in the evidence, it could not say that the "trial court's conclusion was so unreasonable, improbable or unsatisfactory as to justify a reasonable doubt as to the defendants' guilt." **Fields**, 135 Ill.2d at 49. The Supreme Court concluded that the evaluation of the credibility of witnesses, the weight to be given to their testimony, and the inferences to be drawn therefrom were within the province

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[1] Fields raised two additional challenges to his conviction. One such claim alleged that he was deprived of his right to a trial before an impartial trier of fact. This claim, however, is not germane to the present opinion, and said argument rested solely on statements made by Judge Maloney after he found the defendants guilty.

of the trier of fact. As the trier of fact, it was the trial court's function to assess the credibility of the witnesses and to determine whether there was a reasonable doubt as to the defendant's guilt. In the present case, the trial court obviously chose to believe the testimony of the State's witnesses and not that of the defense witnesses. See Fields, 135 Ill. 2d at 40-49.

On October 1, 1990, the United States Supreme Court denied Fields and Hawkins respective petitions for writ of certiorari. Fields v. Illinois (1990), 498 U.S. 881, 112 L.Ed.2d 182, 111 S.Ct. 227. Hawkins v. Illinois (1990), 498 U.S. 881, 112 L.Ed.2d 182, 111 S.Ct. 228. On November 26, 1990, their respective petitions for rehearing were denied. Fields v. Illinois (1990), 498 U.S. 994, 112 L.Ed.2d 555, 111 S.Ct. 547. Hawkins v. Illinois (1990), 498 U.S. 995, 112 L.Ed.2d 558, 111 S.Ct. 551.

On March 1, 1991 and March 8, 1991, Hawkins and Fields respectively filed petitions for post-conviction relief. Although these petitions raised a number of issues, neither petition alleged that the relevant individual was deprived of his right to a trial before an impartial trier of fact premised upon judicial misconduct.

On June 26, 1991, William Swano, Robert McGee and Thomas Maloney were indicted on charges of racketeering conspiracy, racketeering, and extortion under color of official right. 18 U.S.C. Secs. 1962(d), 1962(c), and 1951. Maloney was individually charged with a fourth count,

obstruction of justice. 18 U.S.C. Sec. 1503. As part and parcel of the three counts common to all individuals, the federal government alleged that Swano paid Maloney $10,000 to fix the trial of Earl Hawkins and Nathson Fields.[2] Said money was paid by Swano to Maloney's "bagman", McGee, in order to assure the acquittal of the defendants in a joint bench trial. As part of the conspiracy count, the government contended that the money was retained during the trial by Maloney and McGee until such a time where Swano presented evidence "which would make it appear plausible for...Maloney to enter a judgment of acquittal in the case." Maloney subsequently returned the $10,000 to Swano "in order to cover up and conceal original payments of the bribe."

Prior to the commencement of the trial of Thomas Maloney and Robert McGee, William Swano pleaded guilty to racketeering and agreed to testify against his co-defendants. Another key prosecution witness who would be called during the course of said trial was petitioner Earl Hawkins. The damaging testimony of Hawkins and Swano was corroborated through the testimony of other witnesses, and by evidence of FBI surveillance, recorded telephone conversations, telephone records, and a videotaped conversation. Thomas Maloney did not testify on his own behalf. On April 16, 1993, the jury convicted Thomas

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[2]The indictment also charged that four other bribes were committed.

Maloney of all four charged counts. The jury specifically found that Maloney had engaged in acts of racketeering and had conspired to commit extortion when he accepted and later returned a $10,000 bribe in the trial of Earl Hawkins and Nathson Fields.

Based on the jury's verdict, the following facts were established during the trial of Thomas Maloney. The potential bribe was first discussed between Swano and Hawkins in either December 1985 or January 1986. Hawkins later contacted Alan Knox, who spoke with the El Rukn leader, Jeff Fort, who approved the potential bribe. Around the same time, January or February 1986, Swano met with McGee to see if Maloney would take a bribe in the relevant case. Swano suggested that he could probably get $10,000 from the El Rukns. (From similar previous dealings with Maloney, Swano knew to contact McGee.) Shortly thereafter, McGee got back to Swano and told him that Maloney had agreed to take $10,000 for the fix. Swano subsequently told the El Rukns that the judge would need $20,000.[3] The trial of Hawkins and Fields was continued a number of times due largely in part to Swano's inability to obtain the bribe. After wrangling with the El Rukns, Swano received $10,000 on June 17, 1986. Alan Knox had brought the money to the courthouse and passed it to Swano at the public defender's

[3]The defense's theory at trial was that Swano and others had operated a scam known as "rainmaking," where the participants would never pass the alleged bribe along to the judge.

office. The bench trial of Hawkins and Fields had begun earlier that day. Later that evening, Swano gave the bribe to McGee at Mayor's Row restaurant. On June 19, 1986, at approximately 11:30 a.m., McGee called Swano in the anteroom outside Judge Maloney's chambers and informed him that he needed to "give the books back that he had given him the other day." Swano understood this to mean that the fix was off. However, after Swano placed a few phone calls to McGee, he was able to successfully convince McGee, and apparently Maloney, to continue the fix. Swano told Hawkins about the problems he was having with the bribe. The trial ended on June 26, 1986. Judge Maloney told the parties he would make his findings the next day. Later that evening, McGee called Swano and told him that the judge could not go through with the fix. When Swano went to the courtroom the next morning, Maloney handed him the file folder of money Swano had passed to McGee. Hawkins and Fields were thereafter found guilty.

During his testimony at the Maloney trial, Hawkins stated that in 1987 he spoke with prosecutors from the Cook County State's Attorney's office. Hawkins told the jury he had met with the Assistant State's Attorney who prosecuted him in the Smith and Hickman murder case. Hawkins also met with Assistant United States Attorneys and F.B.I. agents. The discussions with the State and federal prosecutors included information Hawkins had not only about Thomas J. Maloney, but also about other members of the El Rukn street

gang. Hawkins testified he had reached a plea agreement with both the federal government and the state's attorneys' office. Regarding his agreement with the federal government, Hawkins will begin serving a sentence of sixty years after he has completed his State sentence.

On September 8, 1992, Nathson Fields filed his "first amended petition for post-conviction relief." Therein, he alleged, among other claims, that he was denied his right to trial before an impartial trier of fact. The petition specifically mentioned that Judge Maloney had recently been indicted for accepting and then returning a bribe in his cause. On April 17, 1996, Fields filed a motion for judgment on his claim that he was denied a trial before an impartial trier of fact.

On April 17, 1996, Earl Hawkins filed his "first amended petition for post-conviction relief." Among his claims, Hawkins, like Fields, contended that he was denied his right to a trial before an impartial trier of fact. Hawkins also averred that he was denied his right to effective assistance of counsel because William Swano "engaged in improper conduct relating to bribing [Judge] Maloney."

On May 29, 1996, the State filed a motion requesting that the court deny the petitioners' requests for post-conviction relief. The State's argument was threefold: 1) that the petitioners' claims were waived; 2) that they actively participated in the corrupt conduct; and 3) that

the petitioners suffered no actual judicial bias from Judge Maloney.

The petitioners filed reply memoranda on July 26, 1996. In his pleading, Fields repeatedly denied that he or his trial counsel knew of the $10,000 bribe that Swano had passed to Maloney. (On August 28, 1996, Fields' trial attorney filed an affidavit attesting to this lack of knowledge.)

On August 6, 1996, arguments were made by the parties. During the course of this hearing, Fields filed the trial transcript of United States v. Maloney, 91 CR 477 and specifically requested that it was made a formal part of the record. The State did not object to its introduction.

ANALYSIS

Having had the opportunity to evaluate: the relevant pleadings; the applicable case law; and the trial transcripts from the federal prosecution of Judge Maloney, and the state cases of Earl Hawkins and Nathson Fields, this court concludes that an evidentiary hearing is unnecessary. The court has everything it needs to rule on the allegations of the petitions.

The Post-Conviction Hearing Act does not require a trial judge to conduct an evidentiary hearing. The Act gives the post-conviction judge broad discretion as to the type of evidence he or she may consider in ruling on the allegations of the petition. People v. Griffin (1992), 148

Ill.2d 45, 53, 592 N.E.2d 930. Likewise, a judge has wide discretion to limit the type of evidence to be considered in determining the merits of a post-conviction petition. People v. Montgomery (1994), 162 Ill. 2d 109, 113, 642 N.E.2d 1260. Regarding the disposition of a petition in the trial court, 725 ILCS 5/122-6 states in relevant part: "the court may receive proof by affidavits, depositions, oral testimony, or other evidence." Where a defendant's petition presents a question of fact based on the record, an evidentiary hearing should be held, however, where the trial court has everything before it which is needed to rule on the post-conviction petition, then no evidentiary hearing is required. People v. Reed (1st Dist. 1980), 84 Ill.App.3d 1030, 1040, 405 N.E.2d 1065. A trial court may render its decision on a post-conviction petition on the basis of what is contained in the pleadings to which a motion is directed, as well as transcripts of the trial or other proceedings. People v. Adams (1st Dist. 1974), 22 Ill.App.3d 709, 318 N.E.2d 68 (per curium).

The United States Supreme Court has long held that an individual is entitled to fair trial before an impartial trier of fact. Tumey v. Ohio (1927), 273 U.S. 510, 71 L.Ed. 749, 47 S.Ct. 437; In re Murchison (1955), 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623; Mayberry v. Pennsylvania (1971), 400 U.S. 455, 27 L.Ed.2d 532, 91 S.Ct. 499; Ward v. Monroeville (1972), 409 U.S. 57, 34 L.Ed.2d 267, 93 S.Ct.

80; Aetna Life Insurance Co. v. Lavoie (1986), 475 U.S. 813, 89 L.Ed.2d 823, 106 S.Ct. 1580.

In Tumey, 273 U.S. at 523, the Supreme Court held that the mayor of a village, who served in a quasi judicial capacity, had a "direct, personal, pecuniary interest" in convicting a defendant who came before him for trial, where the mayor received twelve dollars of the costs imposed in his behalf. The mayor would not have received said sum had the defendant been acquitted. The court reasoned that "it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case."

Although there were no allegations of judicial impropriety in Tumey, and the court was cognizant that there were "doubtless mayors who would not allow such [ ] consideration...to affect their judgment" the requirement of due process of law in judicial procedure was not satisfied. Hence, the Supreme Court opined:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law. 273 U.S. at 532.

In Ward v. Village of Monroeville (1972), 409 U.S. 57 the court determined that an Ohio mayor was not an impartial

trier of fact where a major part of the village income was derived from fines, forfeitures, costs and fees imposed by him when he sat as a judge. Although the mayor did not have a personal financial interest in the outcome of each proceeding, the "possible temptation" existed. The mayor's executive responsibilities for village finances might have affected his ability to fairly assess fines and costs. The two practically and seriously inconsistent positions, one partisan and the other judicial, necessarily involved a lack of due process of law in the trial of defendants charged with crimes before him. 409 U.S. at 60.

In Aetna Life Insurance Co. v. Lavoie (1986), 475 U.S. 813, 824, the Supreme Court held that an Alabama Supreme Court justice had acted as a "judge in his own case" where he had participated in a case where the decision directly affected a case that the justice had independently filed. The justice's interest was found to be "direct, personal, substantial and pecuniary." (The justice was the author of the opinion and he also cast the decisive vote in a 5 to 4 decision. 475 U.S. at 828.)

The Supreme Court, however, made clear that it was not required to decide whether in fact the justice was influenced, but only whether sitting on the case "would offer a possible temptation to the average...judge to...lead him not to hold the balance nice, clear, and true." 475 U.S. at 825 (citations omitted). Accordingly, Aetna found:

> The Due Process Clause "may sometimes bar trial by judges who have no actual bias and who would do

> their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice'". 475 U.S. at 825 (citations omitted).

Considering the holdings of Tumey, Ward, and Aetna this court concludes that the petitioners were denied a fair trial before an impartial trier of fact. There the Supreme Court found that the judicial officers had a financial interest in the proceedings for which they were presiding. The court rendered the decisions without making any determination of judicial impropriety. The same cannot be said for the conduct of Judge Maloney. His actions were far more egregious. Maloney was convicted for accepting and then returning a bribe in this very cause. He is currently in federal custody serving a sentence for that conviction. Although the judicial officers discussed above had a pecuniary interest in reaching a certain decision, by doing so they did not commit any illicit or illegal acts. Nor were they predisposed to rule a certain way before they heard a scintilla of evidence, by agreeing to "fix" the case. Not only did Judge Maloney have a "direct, personal, substantial, pecuniary interest" in the trial of Hawkins and Fields, justice did not satisfy "the appearance of justice" by the farthest stretch of one's imagination. Accordingly, petitioners Hawkins and Fields were deprived of their respective rights to due process of law.

Having determined that the petitioners were denied a fair trial before an impartial trier of fact, consideration

will now be given to whether: 1) the petitioners waived their rights; 2) Hawkins forfeited said right by actively participating in the bribe; and 3) the petitioners must establish actual bias by Judge Maloney during the course of their trial.

The State cites People v. Titone (1992), 151 Ill.2d 19, 600 N.E.2d 1160 to support the first point of its threefold argument. Dino Titone was indicted on numerous charges stemming from his participation in two murders. He waived his right to a jury trial and received a bench trial before Judge Maloney. He was subsequently convicted of all charged counts and was sentenced to death. His convictions and sentences were affirmed on direct appeal. After Titone's writ of certiorari was denied by the United States Supreme Court, he filed a petition for post-conviction relief. In this petition, Titone alleged for the first time, that his father paid Titone's trial counsel an extra $10,000 which was to be used to pay Maloney to fix the case. The trial court dismissed this portion of the defendant's petition. The Illinois Supreme Court affirmed and found that Titone had waived the claim since he had not raised the issue of judicial prejudice on direct appeal. It reasoned that Titone had been put on notice that the alleged bribery scheme was unsuccessful when he was convicted and sentenced to death. Titone, 151 Ill.2d at 29.

Notwithstanding Titone, application of the waiver rule is not a jurisdictional or absolute bar to review of

procedurally defaulted claims, rather it is a rule of administrative convenience. People v. Owens (1989), 129 Ill.2d 303, 317, 544 N.E.2d 276. Recently, People v. Whitehead (1996), 169 Ill.2d 355, 371-372, 662 N.E.2d 1304 enunciated "three well-established exceptions" to the bar of waiver. Strict application of res judicata and waiver will be relaxed where: 1) fundamental fairness so requires; 2) the alleged waiver stems from incompetency of appointed counsel on appeal; and 3) the facts relating to the the claim do not appear on the face of the original appellate record and could not have been supplemented to that record under Supreme Court Rule 329.

Exceptions one and three apply here. Given the finding that the petitioners were denied an impartial finder of fact, the fundamental fairness exception is evident. Moreover, for the State to contend that the petitioners waited approximately ten years to bring this action is somewhat misleading. Although the petitioners have not previously made these actions "known to any court," Earl Hawkins began cooperating with the state and federal governments as early as 1987. At that time, Earl Hawkins specifically discussed his knowedge of Judge Maloney's involvement in the fix of the Smith and Hickman murder case.

Regarding the other applicable exception, Whitehead, 169 Ill.2d at 372 provided the following clarification:

> ...it is not so much that a claim "could not have been presented" or "raised" by a party on direct appeal, but rather that such a claim could not have been considered by the reviewing court

because the claim's evidentiary basis was de hors the record.

The foregoing explanation is of paramount importance to the present proceeding. The convictions and sentences of Hawkins and Fields were affirmed on direct appeal by the Illinois Supreme Court on February 16, 1990. Judge Maloney was not indicted until June 26, 1991, more than sixteen months later. Using these dates as general guidelines, the issue of the then alleged bribe was clearly not available for appellate review. Hence, the rule of "administrative convenience" is not appropriate under the unique circumstances here.

The State next contends that the petitioners forfeited their right to a trial before an impartial trier of fact because they actively participated in the corrupt conduct they now protest. The State propounds that "[The petitioners] want the best of both worlds, i.e., to attempt to influence to influence the fact finder and then when that fails, to request another chance and blame the fact finder they chose."

This court agrees with the general proposition that those who attempt to corrupt the judicial system may not later hide behind the very constitution they subvert. United States v. Forrest (5th Cir. 1980), 620 F.2d 446, 456-459, however, directly addressed the instant public policy concern. In Forrest, after all the evidence had been heard but prior to final arguments and charges to the jury, the judge was informed of an attempt at jury tampering. A

juror was dismissed and replaced with an alternate when she confirmed that she had been contacted by an acquaintance of the defendant's wife. The defendant and his wife were co-defendants in this matter. The defendants were both found guilty. On appeal, the Forrests contended that they did not receive a trial by a fair and impartial jury. When the circuit court evaluated their claims, it found that it made no difference that it was Forrest himself who had initiated the contact that may have poisoned the jury. The court specifically rejected the suggestion that Forrest could not be heard to complain of the results of his own misconduct. The court was further cognizant and discounted criticism that its holding would encourage defendants to tamper with juries. It did not believe that their holding would furnish defendants with a "heads - I win, tails - you lose" proposition; a successful effort secures an acquittal, an unsuccessful effort secures reversal on appeal. The defendants could be prosecuted and punished for jury tampering.

The court finds the logic of Forrest to be persuasive and will adopt and follow its reasoning. Thus, the claims of petitioners Hawkins and Fields are not barred by their participation in the bribe of Judge Maloney. Hawkins concedes his involvement in said illegal conduct while Fields denies knowledge of the fix. Regardless of what the defendants claim, the State could have charged them with bribery. Although punishment for bribery may seem

infinitesimal contrasted with the ultimate penalty, the applicable classification of crimes is not a function of the judiciary. Where surrender of a fundamental constitutional right is concerned, the court's inquiry cannot be focused upon the "clean hands" of the defendant. Zilich v. Reid (3rd Cir. 1994), 36 F.3d 317, 321 (case remanded for evidentiary hearing on voluntariness of defendant's guilty plea where defendant alleged he was promised a sentence of probation in exchange for $4,000 bribe to trial judge).

The State relies on the test enunciated in People v. Titone (1993), 252 Ill.App.3d 682, 625 N.E.2d 172 and followed in People v. Knade (1st Dist. 1993), 252 Ill.App.3d 682, 625 N.E.2d 172 to support the third component of its threefold argument, that actual judicial bias must be established. Titone adopted a two-prong test originally provided in Commonwealth of Pennsylvania v. Shaw (1990), 398 Pa.Super.341, 508 A.2d 1379 which held that:

> "...in order to support a claim of judicial bias, two requirements must be met: (1) the petitioner must establish a nexus between the activities being investigated and the trial judge's conduct at trial; and (2) the petitioner must allege and establish actual bias resulting from the trial judge's extrajudicial conduct." 151 Ill.2d at 30.

This court finds that the preceding test is not controlling. Not only are Titone and Knade factually distinguishable, the test adopted therein was adopted under a different milieu.

Titone and Knade both dealt with situations where there were only allegations of bribery. In Titone, the

defendant's father stated in an affidavit that he paid his son's trial counsel an additional $10,000 that was to be used to pay Judge Maloney to fix the case. In Knade, the defendant's ex-wife attested that prior to sentencing, she saw the judge having a conversation in his chambers with the victim's son and a police officer. She next observed the officer hand the judge a brown manila envelope. In both cases the respective reviewing courts found there was no evidence of judicial impropriety. Knade, 252 Ill.App.3d at 690 (mere speculation was insufficient); Titone, 151 Ill.2d at 29 (no direct evidence was presented that Judge Maloney solicited, received, or agreed to accept a bribe to influence his decision in the defendant's case). Similar statements cannot be made for the bench trial of Hawkins and Fields. Judge Maloney was found guilty beyond a reasonable doubt by a federal jury for agreeing to fix the petitioners' cause.

Additionally, this court must consider and evaluate the context under which Titone adopted Shaw. At the time Titone's post-conviction petition was being evaluated, Judge Maloney was under investigation for judicial impropriety in nonrelated cases. Titone, 151 Ill.2d at 29 found that this concern was not germane to Dino Titone's contentions; it could not serve to taint all other decisions with which Judge Maloney had been involved.

It is a misstatement of law and fact to contend that the petitioners may have made a preliminary showing in

regard to the first prong of Titone. Guilt proven beyond a reasonable doubt clearly supersedes establishing "a nexus between the activities being investigated and the trial judges conduct at trial."

Furthermore, to hold the petitioners bound by the second prong of Titone under the unique facts of this case, is clearly inappropriate. Inasmuch as the bribe has been established, the second prong is accordingly not applicable.

Moreover, the State's reliance on Branion v. Gramly (7th Cir. 1988), 855 F.2d 1256 for the proposition that the defendant did not establish prejudice is misplaced. In Branion, due to limitations, the issue could only be considered under habeas corpus if the defendant could establish both "cause" and "prejudice." Branion, 855 F.2d at 1267. There, after learning of the judge's intention to enter post-conviction relief in exchange for a bribe, the prosecutor convinced the judge not to enter said order. Evaluating Branion's prejudice component, the reviewing court concluded that the defendant had not established a violation of a constitutional right. Neither the right to have the judge act as a "thirteenth juror" and substitute his judgment for that of a jury, nor the right to a corrupt acquittal, established constitutional prejudice. The relevant ex parte communication only deprived Branion of an entitlement under state law. Branion, 855 F.2d at 1268.

Earl Hawkins and Nathson Fields, however, were deprived of a constitutional right. In all criminal prosecutions the accused is entitled to a fair and impartial trial by jury. People v. Marino (1953), 414 Ill. 445, 450, 111 N.E.2d 534. The right of a defendant to an unbiased, open-minded fact finder is so fundamental to our system of jurisprudence that it should not require either citation or explanation. People v. Eckert (5th Dist. 1990), 194 Ill.App.3d 667, 673, 551 N.E.2d 820.

In People v. Aleman (1st Dist. 1996), ___ Ill.App.3d ___, 667 N.E.2d 615 the appellate court found that double jeopardy did not shield a subsequent prosecution where the earlier acquittal had been procured through a bribe. The constitution demanded fairness not only for the accused but, also, for the accuser. By bribing the judge, Aleman prevented a fair resolution of the first proceeding. Aleman, ___ Ill.App.3d at ___. Fairness is also mandated in the present proceeding. Even if the State could show through the testimony of Judge Maloney and others that Maloney returned the bribe because the defense evidence was not there, principles of fairness require more. Justice must satisfy the appearance of justice. Aetna, 475 U.S. at 825.

The petitioners here were denied a trial before an impartial trier of fact. Said right is rooted in the constitutional guaranty of due process of law and entitles a defendant to a fair and impartial trial before a court which

proceeds not arbitrarily or capriciously, but upon inquiry, and renders judgment only after trial. People v. McDaniels (5th Dist. 1986), 144 Ill.App.3d 459, 462, 494 N.E.2d 1275; City of Chicago v. Cohn (1927), 326 Ill. 372, 374, 158 N.E. 118. If this most basic and fundamental right has not been afforded a defendant during trial, then that defendant has been denied due process of law and is entitled to a new trial. McDaniels 144 Ill.App.3d at 462. Accordingly, the convictions and sentences of Earl Hawkins and Nathson Fields are vacated, and the petitioners are granted a new trial.

C O N C L U S I O N

Based on the foregoing discussion, the sentences and convictions of the petitioners are hereby vacated and they are accordingly granted a new trial.

ENTERED:

Deborah Mary Dooling
Judge of the Circuit
Court of Cook County
Criminal Division

DATED: September 18, 1996

ORIGINAL

No. 96-6133

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

WILLIAM BRACY,

Petitioner,

vs.

RICHARD GRAMLEY, Warden, Pontiac Correctional Center,

Respondent.

On Petition For A Writ Of Certiorari
To The
United States Court of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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CAPITAL CASE

QUESTIONS PRESENTED

1. Whether this collateral litigant is entitled to certiorari on the grounds of an alleged structural defect at trial where he concedes that no bribe was sought or received at his jury trial, and where there is absolutely no evidence of judicial bias, corruption or impropriety during petitioner's trial or sentencing hearing?

2. Whether petitioner's failure to obtain an evidentiary hearing was based solely on his failure to make a substantial or colorable showing that a hearing would result in a finding that a constitutional violation affected the verdict?

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No. 96-6133

IN THE
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RESPONDENT'S BRIEF IN OPPOSITION

PRAYER

Respondent asks this Court to deny the Petition for a Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit, entered April 12, 1996, insofar as petitioner does not raise an issue worthy of review.

OPINION BELOW

The opinion below is cited as Bracy v. Gramley, 81 F.3d 684 (7th Cir. 1996). A copy of the opinion is included in petitioner's appendix.

REASONS FOR DENYING THE WRIT

I.

THIS COLLATERAL LITIGANT IS NOT ENTITLED TO CERTIORARI ON THE GROUNDS OF AN ALLEGED STRUCTURAL DEFECT WHERE HE CONCEDES THAT NO BRIBE WAS SOUGHT OR RECEIVED AT HIS JURY TRIAL, AND WHERE THERE IS ABSOLUTELY NO EVIDENCE OF JUDICIAL BIAS, CORRUPTION OR IMPROPRIETY DURING PETITIONER'S TRIAL AND SENTENCING HEARING.

The petitioner's first contention in support of certiorari is that the United States Court of Appeals for the Seventh Circuit disregarded this Court's holdings in Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 237 (1927), and its progeny by not granting habeas relief in the instant case. (Pet. at 10-16) Petitioner is mistaken, however, because there is not and never has been any evidence of a "structural defect" in this case. Petitioner bases his structural defect argument solely on the uncontestable fact that his trial judge was convicted of racketeering in connection with other criminal cases. Petitioner goes on to argue that that activity necessarily tainted his own trial to such an extent that due process required the granting of habeas relief. As even the dissent conceded below, Judge Maloney, whatever his failings in other cases, did not solicit a bribe from either defendant in this one, nor did the defendants offer him one. Nor did the prosecution bribe Maloney. Accordingly, the panel majority perceived the petitioners as advocating a new rule that would invalidate "a judge's rulings in a case in which he is known not to have taken a bribe, simply because he took bribes in

other cases." Bracy v. Gramley, 81 F.3d 684, 689 (7th Cir. 1996). Since this proposal was without benefit of precedent, the majority declined to apply it, relying on Teague v. Lane, 489 U.S. 288 (1989). Id. The court below recognized that to accept petitioner's argument "would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes." Id. In discussing the plausibility of petitioner's theory that Maloney would be especially harsh to defendants in cases where no bribes changed hands, "to right the balance as it were--it is equally possible that he would fear that by doing so he would create a pattern of inconsistent rulings that would lead people to suspect he was on the take." Id. at 689-690. The court below acknowledged that it was engaging in speculation on this point, but noted that "the defendants are speculating too." Id. at 690. In fact, a review of the transcript failed to show "that there were so few rulings in their favor that the judge must have been biased in favor of the government." Id. at 690 (emphasis in original). Nor did the Supreme Court of Illinois find fault with the rulings. Id. Accordingly, the court below refused to treat the case on a par with one where the trial judge had actually accepted a bribe. That being the case, "ours is a case in which there is merely an appearance of impropriety in the judge's presiding, and an appearance of impropriety does not constitute a denial of due process." Id.

This holding is in complete accord with the decisions of this Court that emphasize the preeminence of state court review, the importance of finality and the extraordinary and limited remedy offered by the writ of habeas corpus.

This Court explained in Barefoot v. Estelle, 463 U.S. 880, 887-888, 103 S.Ct. 3383, 3391-92 (1983), that habeas review in a capital case is no different from habeas review in a non-capital case. Capital defendants are not entitled to special scrutiny. This Court cautioned against undue intrusion on capital review. Direct appeal must remain the primary avenue for review of a conviction and death sentence. When the process of direct review comes to an end, a presumption of finality and legality attaches to the conviction and death sentence. Subsequent federal court review is secondary and limited. Barefoot, 463 U.S. at 887-88, 103 S.Ct. at 3391-92.

Under this framework, then, the court of appeals was correct in noting that "(t)he fact that this is a death case magnifies the appearance of impropriety but is irrelevant to an issue that goes to the propriety of conviction rather than merely to that of the sentence." Bracy, 81 F.3d at 689.

Petitioner, however, attempts to create the appearance of a schism with this Court's opinions in, inter alia, In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955), and Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437 (1927). (Pet. at 10-14) In Murchison, however, the bias was self-evident in the petitioner's own case: the same judge who had sat as the "judge-grand jury" before which witnesses had testified later

presided at a contempt hearing wherein the same witnesses were adjudged in contempt for their conduct before the judge in his role as grand jury. Murchison, 349 U.S. at 136-139. Similarly, in Tumey, this Court found that judges who had a "direct, personal, pecuniary interest in convicting the defendant who came before him for trial" presided in violation of due process. Tumey, 273 U.S. at 523. The finding of bias in Tumey was a matter of record and undisputed by the parties. In contrast, it is undisputed in the instant case that the trial judge had no direct, personal, pecuniary interest in reaching a conclusion against petitioner or his cohort. This distinction is crucial, for without the direct evidence of the existence of bias in this precise case, the doctrines of finality and comity dictate that habeas relief not issue for speculative reasons only. Mere speculation cannot be used to undermine presumptively valid jury verdicts, verdicts that are independent from and insulated from the trial judge. The court below recognized the clear distinction between Tumey, et al., and the instant case, and was scrupulous in its observation of the proper limits of a habeas court. Regardless of Judge Maloney's undeniable misconduct in other cases, that misconduct was not present in the instant case. At best, petitioner can speculate that there was an indirect effect. Even the dissent conceded, however, that:

> . . . one might wonder whether it would really have been in Maloney's interest to assume a pro-prosecution mantle in unfixed cases, lest the occasional acquittal purchased from him look out of character.

Bracy, 81 F.3d at 698 (Rovner, J., dissenting). This Court should agree with the majority, therefore, and decline to impute the taint of corruption to a case where it is conceded that no corruption was present. This not only avoids the domino effect of the inevitable invalidation of 6,000 judgments, multitudes of which, like the instant case, concern defendants whose guilt is overwhelming, but also, and more importantly, recognizes that there was no reason to suppose that this trial was "an unreliable test of the issues presented for decision in it." Bracy, 81 F.3d at 688-689. Petitioner and his co-defendant received a fair trial, and their convictions were derived from the compelling evidence of guilt, not from some intangible scent of bias. The Constitution requires no more.

Petitioner also argues in support of a petition for a writ of certiorari that the court of appeals improperly invoked, sua sponte, Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060 (1989), as an alternative basis for disposition. (Pet. at 15) Petitioner argues that the rule he advanced in this case--that habeas relief is justified in a case where a judge is known not to have taken a bribe, simply because he took bribes in other cases--is not new for purposes of Teague, but was in fact dictated by prior precedent. (Pet. at 15-16) First, it is uncontested that the court below could invoke Teague sua sponte. Caspari v. Bohlen, ___ U.S. ___, 114 S.Ct. 948, 953 (1994). Even the dissent below conceded as much. Bracy, 81 F.3d at 703, citing, inter alia, Goeke v. Branch, ___ U.S. ___,

___, 115 S.Ct. 1275, 1276 (1995). This is not compromised by the fact that a capital case is involved, which for purposes of habeas review is treated the same as any other. See Barefoot v. Estelle, 463 U.S. 880, 887-888, 103 S.Ct. 3383, 3391-92 (1983). As to the correctness of a Teague invocation, Respondent contends that it was entirely proper, for petitioner was advocating a radical departure from Tumey v. Ohio and its progeny.

When the process of direct review comes to an end, a presumption of finality and legality attaches to the conviction and sentence. Barefoot v. Estelle, 463 U.S. 880, 887, 103 S.Ct. 3383, 3391-92 (1983). This Court has acknowledged that the "writ strikes at finality," one of the "law's very objects." McCleskey v. Zant, 499 U.S. 467, 491, 111 S.Ct. 1454, 1468 (1989). The writ of habeas corpus is an extraordinary remedy and upsetting the finality of judgments should be countenanced only in rare instances. See, e.g., Brecht v. Abrahamson, 507 U.S. ___, ___, 113 S.Ct. 1710, 1719 (1993) (noting that "the writ has historically been regarded as an extraordinary remedy"). These important goals of comity and finality were furthered in Teague v. Lane, 489 U.S. 288 (1989), which announced the now-familiar principle that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." Id. at 310. "A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." Id. at 301 (emphasis in original).

As the court below noted, no precedent had been offered extending Tumey and progeny to cases where the bias was not directly confined to the defendant's own case. Bracy, 81 F.3d at 689. The court noted that the proffered rule lacked "a secure grounding in prior cases." Id. Petitioner tries to argue, however, that prior precedent dictates the rule based on a defendant's general right to a fair trial. (Pet. at 13) If one looks to broad rights such as the right to a fair trial, however, the new-rule inquiry is rendered "meaningless if applied at this level of generality." Sawyer v. Smith, 497 U.S. 227, 110 S.Ct. 2822, 2828 (1990).

The Seventh Circuit has been in lockstep with Sawyer on this point. In a recent Illinois capital case they held:

> All procedural rights of criminal defendants evolve out of principles as old as the Constitution and often much older. Teague v. Lane would have no domain of application if limited to cases in which the Court had created a right that had no antecedents in the traditions of Anglo-American criminal procedure.

Stewart v. Gramley, 74 F.3d 132, 134 (7th Cir. 1996) (cert. denied, 1996 U.S. LEXIS 5044, 65 U.S.L.W. 3258 (U.S. 1996)). Accordingly, no error arose by the application of Teague to the instant case.

II.

PETITIONER'S FAILURE TO OBTAIN AN EVIDENTIARY HEARING WAS BASED SOLELY ON HIS FAILURE TO MAKE A SUBSTANTIAL OR COLORABLE SHOWING THAT A HEARING WOULD RESULT IN A FINDING THAT A CONSTITUTIONAL VIOLATION AFFECTED THE VERDICT.

As a second ground in support of certiorari, petitioner argues that the court below improperly held him to a new

standard concerning the showing necessary to obtain an evidentiary hearing on habeas review, a standard at odds with this Court's opinion in Townsend v. Sain, 372 U.S. 293 (1963). (Pet. at 17-23)

The majority, contrary to petitioner's suggestion, was in lockstep with Townsend v. Sain, 372 U.S. 293 (1963), when it held that no hearing was required in this case on this claim. Townsend requires an evidentiary hearing on allegations of newly discovered evidence only when the allegation is "substantial." Townsend, supra, 372 U.S. at 313. Nellum's recantation did not exonerate the petitioners in any way. Bracy v. Gramley, 81 F.3d 684, 692 (7th Cir. 1996). The recantation went to collateral details only, and if they had been fully aired at a hearing (and believed) a new trial was still not warranted. Id. at 693. At best, testimony that revealed Nellum's penchant for changing his story (but not as to the central question of Bracy and Collins's guilt), would have only undermined Nellum's credibility, while leaving intact the core of his testimony. Id. at 694. Contrary to petitioners' suggestion, the majority clearly factored in the aborted deposition, taken years after trial, that was a repetition of the recantation. Id. at 692. Perhaps most important, the majority recognized that there was no reason to suppose Nellum's recantation was either genuine or material. Id. at 694. At no time has the recantation ever been corroborated, despite the undoubted energy of petitioners' counsel. Id. This deficiency continues today, and

petitioners' attempts to establish "partial corroboration" are not persuasive. Properly read, the opinion does not regard the recantation as genuine. The entire tenor of the opinion, and especially the passage on page 694, regards the recantation with deep suspicion. Id. at 694. Even if deemed genuine, however, petitioners have not shown how the recantation is material. Nellum never exonerates either petitioner. Changes in details like the disposal of murder weapons should not have resulted in an evidentiary hearing, because Nellum's prevarications on such long-past minutiae would not have affected the verdict. The panel concluded that the core of his testimony would not have been affected after all, and that "core", of course, was corroborated by the other witnesses and by the guns. The partial recantation, therefore, did not meet the "substantial" threshold of Townsend v. Sain, and the panel majority's treatment offers no reason for certiorari.

Moreover, petitioner is unfounded when he suggests that the court below established a new or different standard for claims based on evidence discovered "many years after his conviction." Pet. at 17, et seq. On the contrary, the court of appeals held quite clearly that the lapse of time was not a reason for the refusal to allow a hearing:

> The circumstances of Nellum's recantation, the strength of the original evidence, and the fact that the core of his testimony was not recanted persuade us that the request for an evidentiary hearing was properly denied.

Bracy, 81 F.3d at 694. The court's dicta concerning the lapse of time is in perfect accord with this Court's pronouncements

on the desirability of finality in the context of state court criminal judgments. See Barefoot and Brecht, Issue I, supra.

The court of appeals did not hold this petitioner to an impossibly high standard, and said as much in the opinion:

> (I)t cannot be a condition of the grant of . . . (an evidentiary) hearing that the movant already have in his possession all the evidence that he seeks to develop in the hearing.

Bracy, 81 F.3d at 692. Unfortunately for the petitioner, the court went on to state:

> But equally it cannot be enough that the petitioner has some new evidence.

Id. (emphasis in original). The court below sensibly recognized that the new evidence was collateral and unlikely to be dispositive, and did not justify what amounts to "an extraordinary interference with the finality of the criminal process." Id. at 693. Since Nellum's collateral recantation would not exonerate Bracy or his co-defendant even if believed, a hearing to develop it further was unjustified. Accordingly, the court below was justified in affirming denial of a hearing based on a recantation that had no assurances of being genuine and that certainly was not material. This lack of materiality defuses the use of Nellum's original testimony on collateral points, since it could not have affected the verdict. United States v. Agurs, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397 (1976); Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766 (1972). As the court below correctly found:

> The evidence of Bracy's and Collins's guilt was very powerful and evidence brought out

> at the evidentiary hearing which if repeated at a new trial would merely cast doubt on Nellum's credibility would be unlikely to sway a jury.

Bracy, 81 F.3d at 694.

Although petitioner and his co-petitioner have never shown or proved that the prosecution knowingly allowed Nellum to perjure himself, and Respondent continues to attribute the recantation solely to Nellum's own unknown agenda and membership in "the criminal demimonde," Bracy, 81 F.3d at 694, it is also clear that the recantation was to collateral matters only and that the false portion of testimony, if any, was immaterial. Certiorari, therefore, is inadvisable under the fact-specific nature of the claim and the fact that the claim, even if true, did not affect the reliability of the verdict.

Finally, it is worth noting that the dissenting judge based her opinion solely on the judicial bias issue, and so petitioner's remaining issue in support of certiorari does not carry the favor of even one panel member. Respondent maintains that the petition must be denied, as the majority opinion correctly analyzed and decided the issues before it, and properly affirmed the denial of the petitions for writs of habeas corpus.

CONCLUSION

WHEREFORE, Respondent asks this Court to deny the petition for writ of certiorari in this cause.

Respectfully submitted,

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November 8, 1996

No. 96-6133

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1996

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WILLIAM BRACY,

Petitioner,

vs.

RICHARD GRAMLEY, Warden, Pontiac Correctional Center,

Respondent.

CERTIFICATE OF SERVICE AND STATEMENT OF TIMELY FILING

I, Steven J. Zick, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served twelve (12) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 100 West Randolph Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

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Supreme Court Building
Washington, D.C. 20543

2.) That all parties required to be served have been served, to wit:

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I further state that this mailing took place on November 8, 1996, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: _____
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NOTARY PUBLIC

96-6133

ORIGINAL

CERTIFICATE OF SERVICE

I certify that on September 24, 1996, I caused to have mailed by U.S. Postal Service a copy of the foregoing document to the opposing party's attorney:

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No. 96-6133

In The

Supreme Court of the United States

October Term, 1996

WILLIAM BRACY,

Petitioner,

vs.

RICHARD GRAMLEY, Warden,
Pontiac Correctional Center,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed September 27, 1996
Certiorari Granted January 10, 1997

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

February, 1981 – Indictment filed in the Circuit Court of Cook County, Illinois, charging Petitioner, Roger Collins, and Murray Hooper with murder.

March 12, 1981 – Case assigned to Judge Thomas J. Maloney.

June 2, 1981 – Judge Maloney appoints Robert J. McDonnell to represent Petitioner.

July 22, 1981 – Joint jury trial of Petitioner and Roger Collins commences.

July 29, 1981 – Jury verdicts returned.

July 30, 1981 – Joint death penalty hearing commences.

July 31, 1981 – Jury verdicts imposing death penalty returned.

September 9, 1981 – Judge Maloney enters orders imposing sentences of death.

February 22, 1985 – Illinois Supreme Court affirms on direct appeal.

March 21, 1991 – Joint post-conviction petition filed by Petitioner and Roger Collins is dismissed.

July 20, 1992 – Illinois Supreme Court denies motion to stay proceedings pending outcome of Maloney indictment.

November 19, 1992 – Illinois Supreme Court affirms dismissal of post-conviction petition.

August 31, 1993 – Petitioner files Petition for Writ of Habeas Corpus in United States District Court, Northern District of Illinois.

January 27, 1994 – State files its Response to Petition for Writ of Habeas Corpus and Supporting Memorandum.

March 24, 1994 – Petitioner files Reply to State's Response and Supporting Memorandum.

April 8, 1994 – Oral argument held and matter taken under advisement by the District Court.

June 27, 1994 – Petitioner Roger Collins files Supplemental Motion for Discovery.

August 24, 1994 – District Court enters memorandum opinion and order granting Respondent's Motion to Dismiss the Petition, and denying Petitioner's Motion for Discovery and Roger Collins Supplemental Motion for Discovery. Judgment entered for Respondent.

September 8, 1994 – Petitioner files Motion to Amend Judgment.

November 4, 1994 – District Court enters order denying Motion to Amend Judgment.

December 2, 1994 – Petitioner files Notice of Appeal to the United States Court of Appeals for the Seventh Circuit.

December 6, 1994 – District Court enters order granting Petitioner's Motion for Certificate of Probable Cause.

December 30, 1994 – Court of Appeals orders this case consolidated with the appeal of Roger Collins for purposes of briefing and disposition.

November 29, 1995 – Oral argument heard and the Court of Appeals takes the matter under advisement.

April 12, 1996 – Court of Appeals issues opinion and order affirming the Decision of the District Court.

April 26, 1996 – Petitioner files Petition for Rehearing with Suggestion for Rehearing Enbanc.

June 26, 1996 – Court of Appeals enters order denying Petition for Rehearing with Suggestion for Rehearing Enbanc.

September 27, 1996 – Petitioner files Petition for Writ of Certiorari in the United States Supreme Court.

January 10, 1997 – United States Supreme Court enters order granting in part the Petition for Writ of Certiorari.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

United States of America, ex rel. WILLIAM BRACY (A-01532), Petitioner,	)	No. 93C-5328
v.	)	
RICHARD GRAMLEY, Warden, Pontiac Correctional Center, Respondent.	)	

PETITION FOR WRIT OF HABEAS CORPUS BY A STATE PRISONER UNDER SENTENCE OF DEATH

August 31, 1993

* * *

98. There is a reasonable probability that had the above referenced deficiencies not occurred, the results at the trial and sentencing would have been different. The Petitioner was thereby deprived of his right to effective assistance of trial counsel in violation of the Sixth and Fourteenth Amendments to the United States Constitution.

99. Some but not all of the above-cited instances of ineffective assistance of counsel were raised on direct appeal or on post conviction and decided against the

Petitioner. The failure to raise the unraised claims was due the ineffective assistance of appellate counsel and/or the failure of the State to appropriate any resources to enable the Petitioner to perfect his post conviction claims. The lack of resources included but are not limited to no money to pay post conviction counsel, and refusal of the trial court to appoint an investigator or subpoena witnesses.

X.

100. The trial judge, Thomas J. Maloney, was recently convicted in the U.S. District Court for the Northern District of Illinois of crimes related to taking bribes to fix criminal cases. In two or three separate incidents spanning a period of 1981 to 1986, Judge Maloney took money in return for rendering not guilty verdicts. According to The Chicago Tribune, the FBI investigation began in 1980.

101. Most of the discretionary rulings that Judge Maloney made in the Petitioner's trial were made in favor of the State and, at the time, Judge Maloney had a reputation for being a strict judge who was partial to "law and order". There is cause to believe that Judge Maloney's discretionary rulings in this case may have been influenced by a desire on his part to allay suspicion of his pattern of corruption and dishonesty.

102. The Petitioner was deprived of his right to a fair trial in violation of the Due Process Clause of the Fourteenth Amendment.

103. This claim was not raised on direct appeal or on state post conviction because, at the time, there was no means to discover the basis of the claim. The Petitioner's post conviction counsel did bring it to the attention of the Illinois Supreme Court by including it in his reply brief as soon as he became aware of Judge Maloney's indictment. However, the Illinois Supreme Court did not rule on the claim.

XI.

104. The penalty phase of the Petitioner's trial began on the day following the guilty verdicts. III RT 1430. The Petitioner's counsel moved for a continuance to prepare to rebut the Arizona evidence and to gather mitigation evidence and the motion was denied. *Id.* at 1425, 1439.

105. Had the Petitioner's trial counsel been given a reasonable continuance, he would have been able to call witnesses who would have testified that the Petitioner was in Chicago on December 31, 1980, the date of the Redmond/Phelps murders in Phoenix. These witnesses were Margaret Bracy, Kelly Bracy, Tony Salas, George "Sandy" Barren and Beatrice Mack.

* * *

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, ex rel. WILLIAM BRACEY, Petitioner, vs. RICHARD GRAMLEY, Warden, Pontiac Correctional Center, Respondent.	)	No. 93 C 5328 The Honorable William T. Hart, Judge Presiding.

MEMORANDUM OF LAW IN SUPPORT OF RESPONSE TO PETITION FOR A WRIT OF HABEAS CORPUS

January 27, 1994

* * *

brought to the Illinois jury's attention at the death penalty sentencing hearing. Also alleged as error is the fact that counsel in the Illinois case did not present allegedly mitigating evidence concerning Petitioner's background. First, neither of these arguments was presented to the Illinois courts, and cannot now be presented here as a basis for issuance of the Writ of Habeas Corpus. *Spurlark, supra.* It should be noted here that counsel on Petitioner's direct appeal and post-conviction appeal was not the same counsel as represented Bracey at trial. Thus, nothing prevented these allegations from being made.

Moreover, the allegations deal with the calling of witnesses, a matter of strategy and tactics which will not properly serve as the basis of the contention or ineffectiveness under the *Strickland* standard.

As can be seen from the above, these arguments do not show ineffectiveness of either trial or appellate counsel. Therefore, they supply no ground for the granting of Habeas Corpus relief.

X.
(Paragraphs 100-103)

Petitioner asserts next that the recent conviction of the judge who presided over his trial for crimes related to taking bribes somehow should entitle Petitioner to relief. There is no indication at all that Petitioner attempted to bribe the judge. Rather Petitioner wishes this Court to draw the inference that he might not have received a fair trial since the judge, in an attempt to cover up his dishonest rulings in other cases, might have been too strict in his rulings as to defendant. The Illinois Supreme Court has twice scrutinized the record here and has affirmed Petitioner's convictions, sentence and dismissal of his Post-Conviction Petition. Such rampant speculation as is indulged in by Petitioner here certainly does not amount to any basis upon which to consider, let alone grant, habeas corpus relief.

Petitioner says that this argument was not ruled upon by the Illinois Supreme Court. This was because it was presented improperly as part of a reply brief, in which completely new allegations of error may not be

made. Moreover, Petitioner cannot present factual evidence for the first time on habeas when it was clearly in existence during state proceedings. *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992). This does not concede, however, that Petitioner's baseless speculation even amounts to "evidence."

XI.
(Paragraphs 104-108)

Petitioner contends that he was prejudiced by the trial judge's denying him a lengthy continuance between the conviction and the beginning of the penalty stage of the trial. This argument was made before the Illinois Supreme Court and there rejected after full consideration. *People v. Collins, et al.*, 106 Ill. 2d 237, 280-282, 478 N.E.2d 267 (1985).

* * *

IN THE
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES ex rel. WILLIAM BRACEY,	)	
Petitioner,	)	No. 93 C 5328
v.	)	Honorable William T. Hart,
Richard Gramley, Warden, Pontiac Correctional Center,	)	Judge Presiding.
Respondent.	)	

PETITIONER'S REPLY TO THE STATE'S RESPONSE AND SUPPORTING MEMORANDUM OF LAW

March 24, 1994

* * *

beaten by the police, he lied when he said he said he heard shots, he lied when he said he saw Hooper at Roosevelt and Clark, he lied when he said that he saw the victims being led to the car in the parking lot, and he lied when he said that he saw Bracy in the possession of a shotgun. Nellum also stated that he was deliberately induced to commit perjury by Assistant State's Attorney Greg Owen, who was present at the time of Nellum's interrogation. This Court is required to assume that these facts are true in determining whether or not to grant Petitioner an evidentiary hearing. Also, the Petitioner has made the necessary showing of materiality under the standard for knowing use of perjury set forth in *United States v. Agurs, supra.* Given the central role that Nellum

played in the State's case, there is ample reason to believe that Nellum's false testimony could have affected the verdict, even if the false testimony only related to issues of credibility. *Napue v. Illinois, supra.* The Petitioner has therefor made the necessary showing with respect to this claim and is entitled to an evidentiary hearing.

V.

[Reply as to Claim X of Petition]

Petitioner Bracy was Denied His Due Process Right to a Fair Trial Before an Impartial Judge.

In April of 1993, the presiding judge at Petitioner's trial, Thomas J. Maloney, was convicted of extortion and racketeering charges following a jury trial in the United States District Court for the Northern District of Illinois. *United States v. Thomas J. Maloney, et al.*, No. 91 CR 477. (A copy of the indictment is attached as Exhibit 2 to this reply.) Petitioner has alleged that the evidence presented by the government in that trial – that from 1980 to 1986 Judge Maloney was engaged in an ongoing conspiracy involving the solicitation and acceptance of bribes to corruptly fix the outcome of criminal cases before him – establishes that petitioner was denied his due process right to an unbiased judge at his 1981 trial and capital sentencing hearing.

In its response, the State does not dispute that Judge Maloney took bribes to fix criminal cases and that this corrupt activity was occurring at the time of Petitioner's trial. The State instead asserts that since there is no allegation of bribery in Petitioner's case, his claim of the denial of an impartial judge is "rampant speculation"

which provides no basis for federal relief. (Bracy Response at 25-26) Initially, it must be stressed that all of the facts bearing on this issue are not before the court as Petitioner does not have a transcript of Judge Maloney's trial and has not yet received the assistance of the court to investigate this claim.[1] Petitioner is thus seeking discovery and an evidentiary hearing to fully develop the facts bearing on his allegation of judicial bias; and contrary to the State's argument, the uncontested allegations presently before this court concerning Judge Maloney's corrupt practices are sufficient to require a hearing. (see supra, p. 21-22)

A basic component of due process of law is the right to a trial before an unbiased judge, *Dyas v. Lockhart*, 705 F. 2d 993, 995 (8th Cir. 1983), and this right is so fundamental that " . . . not even the appearance of bias is tolerated." *Daye v. Attorney General of New York*, 696 F. 2d 186, 196 (2nd Cir. 1982). To determine whether this right has been violated in particular circumstances, the United States Supreme Court has stated that the test is whether the situation is one " . . . which would offer a possible temptation to the average man as a judge to . . . lead him not to hold the balance nice, clear and true between the

[1] For example, in addition to the five cases alleged in the indictment, the government also presented testimony that Judge Maloney received $2500 to fix the case of *People v. Wilfredo Rosario*, a murder prosecution. In that case the money was received in 1980, and after later suppressing the defendant's confession, Maloney acquitted him in mid-1981. (See Exhibit 3) Moreover, Petitioner believes that the government also elicited testimony to the effect that defendants who did not pay bribes to Maloney received adverse rulings.

State and the accused. . . . " *Ward v. Monroeville*, 409 U.S. 57, 60 (1972), quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

Applying this standard here, Judge Maloney's situation was clearly one in which there would be the "possible temptation" for him not to be impartial between the State and Mr. Bracy when making his numerous discretionary rulings at Petitioner's trial and capital sentencing hearing. Judge Maloney's bribe-taking scheme motivated him to rule in favor of the State in cases such as Petitioner's, where no bribe was involved, in order [sic] divert suspicion from his corrupt practices. Moreover, in applying the test for whether a particular situation creates the probability of judicial bias, the petitioner's case is unique. Normally, in evaluating such claims a reviewing court must " . . . presume the honesty and integrity of those serving as judges." *Dyas v. Lockhart*, 705 F. 2d 993, 997 (8th Cir. 1983). The instant case involves a judge who has been proven to be corrupt and who therefore would not scruple at succumbing to the temptation to abandon his impartiality in favor of the State in order to further and protect his illicit activities. Petitioner's trial before such a judge does not "satisfy the appearance of justice," *In re Murchison*, 349 U. S. 133, 136 (1955), and violated his right to due process of law.

Finally, the State asserts that the evidence underlying this claim cannot be presented for the first time on habeas because "it was clearly in existence during state proceedings". (Bracy Response at 26) This assertion is incorrect, as the evidence of Judge Maloney's corrupt activities was not available to Petitioner until well after his state post-conviction proceedings ended.

The Illinois Supreme Court affirmed the dismissal of Bracy's post-conviction petition on November 19, 1992. Judge Maloney's trial and conviction, upon which Bracy's due process claim is based, did not occur until 1993. The State's apparent suggestion that this claim has been procedurally defaulted is therefore without merit. A showing that the factual basis of a claim was not reasonably available to counsel during the state court proceedings constitutes cause for an alleged default, *Murray v. Carrier*, 477 U.S. 478, 488 (1986), *Lewis v. Lane*, 832 F. 2d 1446,1456-1457 (7th. Cir. 1987); and, as discussed above, petitioner's allegation that he was denied a trial before an impartial judge, if true, establishes the prejudice necessary to entitle him to federal review as such a trial is fundamentally unfair. See *Rose v. Clark*, 478 U.S. 570, 577 (1986).

VI.

[Reply as to Claims IV and XIV of Petition]

The Petitioner Was Deprived of a Fair Trial and Was Improperly Sentenced to Death Because of the Comments of the Assistant State's Attorneys in Final Argument.

A. Facts

In the course of his initial summation, Assistant State's Attorney Greg Owen argued as follows:

> Do you think Lawrence Hyman came in and lied for me and Goggin? Do you think O'Callaghan lied for us? Do you think an attorney would put his license on the line for the likes of these two, Collins and Bracy? There is no way. We go to school too long for that, to get up and perjure

> ourselves for those two guys, or against those two guys. (3 RT 1285).

At a later point in his summation, Mr. Owen argued as follows:

> The gun's in the lake; when Morris Nellum was on the witness stand he was cross-examined about the guns and he told you that he did in fact lie to the police. He said, 'yes, I lied, I told the police I didn't know where the guns were.' And you also heard that I interviewed Nellum a few hours later. Did you hear any questions about what Nellum told me about the guns? Did you hear anything about that at all? Did any lawyer for the defense ask that question? You see, I can't. That is improper for me, but they didn't because they didn't want to hear that. (3 RT 1288).

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EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 91 CR 477
v.	)	Violations: Title 18,
THOMAS J. MALONEY, ROBERT MCGEE and WILLIAM A. SWANO	)	United States Code, Sections 1503, 1951, 1962(c) and (d) SUPERSEDING INDICTMENT

COUNT ONE

(Filed Jun. 25, 1991)

The SPECIAL OCTOBER 1990-1 GRAND JURY charges:

1. At the times material to this indictment:

a. There were in force and effect criminal statutes of the State of Illinois involving bribery, including Illinois Revised Statutes, Chapter 38, Sections 33-1(a)-(e), the violation of which was punishable by imprisonment for more than one year. Chapter 38, Sections 33-1(a)-(d) provided as follows:

33-1 Bribery

§33-1. Bribery. A person commits bribery when:

(a) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or

tenders to that person any property or personal advantage which he is not authorized by law to accept; or (b) With intent to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to one whom he believes to be a public officer, public employee, juror or witness, any property or personal advantage which a public officer, public employee, juror or witness would not be authorized by law to accept; or (c) With intent to cause any person to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness, he promises or tenders to that person any property or personal advantage which he is not authorized by law to accept; or (d) He receives, retains or agrees to accept any property or personal advantage which he is not authorized by law to accept knowing that such property or personal advantage was promised or tendered with intent to cause him to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness;

Prior to January 1, 1986, Chapter 38, Section 33-1(e) provided as follows:

§33-1. Bribery. A person commits bribery when: . . .

(e) He solicits any property or personal advantage which he is not authorized by law to accept pursuant to an understanding that he shall influence the performance of

> any act related to the employment or function of any public officer, public employee, juror or witness.

At all times since January 1, 1986, Chapter 38, Section 33-1(e) provided as follows:

> §33-1. Bribery. A person commits bribery when:
>
> (e) He solicits, receives, retains, or agrees to accept any property or personal advantage pursuant to an understanding that he shall improperly influence or attempt to influence the performance of any act related to the employment or function of any public officer, public employee, juror or witness.

b. There was in force and effect a criminal statute of the State of Illinois that prohibited conspiracy to commit an offense, including conspiracy to commit bribery, the violation of which was punishable by imprisonment for more than one year. Illinois Revised Statutes, Chapter 38, Section 8-2, provided in pertinent part that:

> A person commits conspiracy when, with intent that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement is alleged and proved to have been committed by him or by a co-conspirator.

c. There was in force and effect a federal obstruction of justice statute, Title 18, United States Code, Section 1503, that prohibited endeavors to influence, obstruct, or impede the due administration of justice.

d. There was in force and effect a federal statute, Title 18, United States Code, Section 1951, that prohibited conspiracy to commit extortion and extortion, extortion that affected interstate commerce under color of official right.

2. At the times material to this indictment:

a. The Circuit Court of Cook County was a governmental body authorized and empowered under the Constitution and laws of the State of Illinois to hear and decide various legal actions and proceedings arising in the County of Cook in the State of Illinois.

b. The Circuit Court of Cook County was an "enterprise," the activities of which affected interstate commerce as that term is defined in Title 18, United States Code, Section 1961(4).

c. The Criminal Division of the Circuit Court of Cook County was responsible for hearing criminal cases arising in Cook County.

d. Defendant THOMAS J. MALONEY was a judge of the Criminal Division with responsibility for hearing and deciding criminal cases that were assigned to him, and was a person associated with and employed by the Circuit Court of Cook County, the "enterprise" described in subparagraph 2(b) above.

e. Defendant ROBERT MCGEE was an attorney licensed to practice in Illinois, and was a person associated with the Circuit Court of Cook County, the "enterprise" described in subparagraph 2(b) above.

f. Defendant WILLLIAM A. SWANO was an attorney licensed to practice in Illinois, and was a person

associated with the Circuit Court of Cook County, the "enterprise" described in subparagraph 2(b) above.

g. Among the cases assigned to defendant THOMAS J. MALONEY were *People of the State of Illinois v. Lenny Chow et al.*, 81 C 4020, a case charging murder in which the defendants were acquitted by defendant THOMAS J. MALONEY in a bench trial in August 1981; *People of the State of Illinois v. Owen Jones*, 81 C 9832, a case charging murder in which the defendant was convicted of voluntary manslaughter and sentenced to 9 years' incarceration by defendant THOMAS J. MALONEY in 1982; *People of the State of Illinois v. Ronald Roby*, 82 I 50244, a case charging theft, forgery, deceptive practices, and unlawful use of credit cards in which the defendant was granted three years' probation by defendant THOMAS J. MALONEY in September 1982; *People of the State of Illinois v. Frank Calistro*, 82 C 8355, a case charging aggravated battery in which the defendant was sentenced to probation by defendant THOMAS J. MALONEY in January 1983; and *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, a case charging murder in which the defendants were convicted by defendant THOMAS J. MALONEY in a bench trial in June 1986.

3. Beginning in approximately 1980 and continuing until approximately July 1990, in the Northern District of Illinois, Eastern Division,

THOMAS J. MALONEY and
ROBERT MCGEE,

defendants herein, being persons associated with the enterprise described in paragraph 2 above, did knowingly conspire and agree, together with others known and

unknown to the Grand Jury, to conduct and participate in the conduct of the affairs of that enterprise, directly and indirectly, through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Section 1961(5), said racketeering activity consisting of multiple acts involving bribery under Illinois law, and obstruction of justice and extortion under federal law, as set forth and charged in Count Two of this indictment as Racketeering Acts Numbers 1 through 6.

a. It was part of the conspiracy that defendant THOMAS J. MALONEY abused his position as a judge of the Circuit Court of Cook County by conspiring, soliciting, receiving, retaining, and agreeing to accept money to "fix," that is, corruptly determine issues of fact and/or law, and agree to fix the results in criminal felony cases pending before him.

b. It was part of the conspiracy that defendant ROBERT MCGEE conspired, solicited, obtained, received, and retained, on behalf of and at the direction of defendant THOMAS J. MALONEY, money from attorneys, including defendant WILLIAM A. SWANO and others, for the purpose of corruptly fixing and agreeing to fix the results in criminal felony cases pending before defendant THOMAS J. MALONEY, and acted as a conduit or "bagman" for defendant THOMAS J. MALONEY in passing said money to defendant THOMAS J. MALONEY.

c. It was further part of the conspiracy that in 1981, defendant THOMAS J. MALONEY received money, from persons known and unknown to the Grand Jury, to pay for the fixing of the murder charges in *People of the State of Illinois v. Lenny Chow, et al.*, 81 C 4020, in order to

assure the acquittal of the defendants charged in that case.

d. It was further part of the conspiracy that in 1982, defendant THOMAS J. MALONEY agreed to receive money from defendant WILLIAM A. SWANO to pay for the fixing of the murder charges in *People of the State of Illinois v. Owen Jones*, 81 C 9832, in order to assure that the defendant charged in that case would be acquitted of the murder charged and be found guilty of the lesser charge of voluntary manslaughter.

e. It was further part of the conspiracy that in 1982, defendant WILLIAM A. SWANO gave bribe money to defendant ROBERT McGEE, who was acting as a conduit and "bagman" for defendant THOMAS J. MALONEY, in order to assure that the defendant in *People of the State of Illinois v. Owen Jones*, 81 C 9832, would be convicted of voluntary manslaughter rather than murder, and would be sentenced to 9 years' imprisonment.

f. It was further part of the conspiracy that in 1982, defendant THOMAS J. MALONEY, pursuant to the corrupt agreement with WILLIAM A. SWANO, acquitted Owen Jones of murder, convicted him of the lesser crime of voluntary manslaughter, and sentenced him to 9 years' imprisonment, pursuant to the agreement between THOMAS J. MALONEY and WILLIAM A. SWANO to fix Owen Jones' case for the payment of money.

g. It was further part of the conspiracy that in approximately the summer of 1982, defendant THOMAS J. MALONEY agreed to receive money from attorney WILLIAM A. SWANO in connection with the case of *People of the State of Illinois v. Ronald Roby*, 82 I 50244, in

order to assure that the defendant would receive a sentence of probation in that case.

h. It was further part of the conspiracy that in approximately August 1982, WILLIAM A. SWANO paid money to an intermediary or "bagman" for defendant THOMAS J. MALONEY in order to fix the defendant's sentence in *People of the State of Illinois v. Ronald Roby*, 82 I 50244.

i. It was further part of the conspiracy that on September 3, 1982, defendant THOMAS J. MALONEY sentenced Ronald Roby to a term of three years' probation, pursuant to the agreement between defendant THOMAS J. MALONEY and defendant WILLIAM A. SWANO to fix Ronald Roby's sentence in exchange for the payment of money.

j. It was further part of the conspiracy that in 1982, defendant THOMAS J. MALONEY agreed to receive money from defendant WILLIAM A. SWANO in connection with the aggravated battery charges in *People of the State of Illinois v. Frank Calistro*, 82 C 8355, in order to assure that the defendant charged in that case received a sentence of probation.

k. It was further part of the conspiracy that in approximately December 1982 or early January 1983, defendant WILLIAM A. SWANO gave bribe money to defendant ROBERT McGEE, who was acting as a conduit and "bagman" for defendant THOMAS J. MALONEY, in order to assure that the defendant in *People of the State of Illinois v. Frank Calistro*, 82 C 8355, would receive a sentence of probation on charges of aggravated battery.

l. It was further part of the conspiracy that on January 12, 1983, defendant THOMAS J. MALONEY sentenced Frank Calistro to probation, pursuant to the agreement between defendant THOMAS J. MALONEY and defendant WILLIAM A. SWANO to fix Frank Calistro's sentence for the payment of money.

m. It was further part of the conspiracy that between approximately January 1986 and June 27, 1986, defendant THOMAS J. MALONEY conspired and agreed to receive $10,000 to pay for the fixing of the murder charges in *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, in order to assure the acquittal of the defendants charged in that case.

n. It was further part of the conspiracy that on June 17, 1986, defendant ROBERT MCGEE, acting as a "bagman" and conduit for defendant THOMAS J. MALONEY, received $10,000 from defendant WILLIAM A. SWANO to pay for the fixing of the murder charges in *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, pursuant to an agreement that defendant THOMAS J. MALONEY would acquit the defendants charged in that case in a bench trial.

o. It was further part of the conspiracy that during the trial of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, defendants THOMAS J. MALONEY and ROBERT MCGEE discussed with defendant WILLIAM A. SWANO the ongoing nature of the bribe and the continued retention of the approximate $10,000 paid to fix the case, and defendant THOMAS J. MALONEY agreed to retain the $10,000 bribe money until such time as defendant WILLIAM A.

SWANO presented evidence which would make it appear plausible for defendant THOMAS J. MALONEY to enter a judgment of acquittal in the case.

p. It was further part of the conspiracy that on June 27, 1986, after the conclusion of the evidence in the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, defendant THOMAS J. MALONEY returned the $10,000 he had received and retained to fix the case to defendant WILLIAM A. SWANO in order to cover up and conceal original payments of the bribe, and entered a judgment of guilty against the defendants.

q. It was further part of the conspiracy that in approximately the summer of 1989, defendant THOMAS J. MALONEY approached defendant WILLIAM A. SWANO after defendant THOMAS J. MALONEY and WILLIAM A. SWANO knew that their activities in connection with the aborted fix of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, were under active investigation by federal law enforcement authorities, and THOMAS J. MALONEY told defendant WILLIAM A. SWANO to refuse to cooperate with the federal investigation and that defendant THOMAS J. MALONEY offered to arrange for an attorney to represent defendant WILLIAM A. SWANO in connection with the investigation.

r. It was further part of the conspiracy that in approximately June or July 1990, defendant THOMAS J. MALONEY had a conversation with defendant WILLIAM A. SWANO in which defendant THOMAS J. MALONEY again told defendant WILLIAM A. SWANO to refuse to

cooperate with the federal investigation, and offered to arrange for an attorney to represent defendant WILLIAM A. SWANO in connection with the investigation.

s. It was further part of the conspiracy that defendant THOMAS J. MALONEY took steps to hide and conceal from the Internal Revenue Service and other law enforcement agencies the bribe money he received to corruptly fix felony criminal cases.

t. It was further part of the conspiracy that the conspirators would conceal, misrepresent, and hide, and cause to be concealed, misrepresented, and hidden, the existence, purpose, and acts done in furtherance of the conspiracy;

All in violation of Title 18, United States Code, Section 1962(d).

COUNT TWO

The SPECIAL OCTOBER 1990-1 GRAND JURY further charges:

1. The Grand Jury realleges and incorporates by reference paragraphs 1 and 2 of Count One of this indictment.

2. From in or about 1980 until in or about July 1990, at Chicago and elsewhere, in the Northern District of Illinois,

THOMAS J. MALONEY,
ROBERT MCGEE, and
WILLIAM A. SWANO,

defendants herein, being persons associated with the enterprise described in paragraph 2 of Count One, did knowingly conduct and participate, directly and indirectly, in the conduct of the affairs of that enterprise through a pattern of racketeering activity, as that term is defined in Title 18, United States Code, Section 1961, which racketeering activity consisted of multiple acts involving bribery and conspiracy to commit bribery under Illinois law, and extortion and obstruction of justice under federal law. Specifically, the pattern of racketeering activity engaged in by defendants THOMAS J. MALONEY, ROBERT MCGEE, and WILLIAM A. SWANO consisted of the following acts:

RACKETEERING ACT NUMBER 1

In or about 1981, in Chicago, defendant THOMAS J. MALONEY solicited, received, retained, and agreed to accept money which he was not authorized by law to accept, knowing that such money was promised and tendered with the intent to cause him to influence the performance of an act related to his employment as a public officer, namely, to corruptly fix and agree to fix the outcome of the trial of *People of the State of Illinois v. Lenny Chow et al*, 80 C 4020, by acquitting the defendants charged in that case; in violation of Illinois Revised Statutes, Chapter 38, Section 33l(d) and (e).

RACKETEERING ACT NUMBER 2

In or about 1982, in Chicago, defendant THOMAS J. MALONEY solicited, received, retained, and agreed to accept money which he was not authorized by law to

accept, knowing that such money was promised and tendered with the intent to cause him to influence the performance of an act related to his employment as a public officer, namely, to corruptly fix and agree to fix the defendant's sentence in *People of the State of Illinois v. Ronald Roby*, 82 I 50244, by sentencing the defendant to a period of probation; in violation of Illinois Revised Statutes, Chapter 38, Section 33-1(d) and (e).

RACKETEERING ACT NUMBER 3

In or about 1982, at Chicago, in the Northern District of Illinois, defendants THOMAS J. MALONEY and ROBERT McGEE solicited, received, retained, and agreed to accept money from defendant WILLIAM A. SWANO pursuant to an understanding that they would improperly influence or attempt to influence the performance of an act related to the employment or function of a public officer, that is, the defendant THOMAS J. MALONEY would corruptly fix the outcome of the case of *People of the State of Illinois v. Owen Jones*, 81 C 9832, by acquitting the defendant of murder, convicting him of the less serious charge of voluntary manslaughter, and sentencing him to 9 years imprisonment in exchange for a bribe of money; in violation of Illinois Revised Statutes, Chapter 38, Section 33l(c), (d), and (e).

RACKETEERING ACT NUMBER 4

In or about late 1982 and early 1983, at Chicago, in the Northern District of Illinois, defendants THOMAS J. MALONEY and ROBERT McGEE solicited, received, retained, and agreed to accept money from WILLIAM A.

SWANO pursuant to an understanding that they would improperly influence or attempt to influence the performance of an act related to the employment or function of a public officer, that is, that defendant THOMAS J. MALONEY would corruptly fix the defendant's sentence in the case of *People of the State of Illinois v. Frank Calistro*, 82 C 8355, by sentencing the defendant to probation on charges of aggravated battery in exchange for a bribe of money; in violation of Illinois Revised Statutes, Chapter 38, Sections 33-1(c), (d), and (e).

RACKETEERING ACT NUMBER 5

In or about 1986, in Chicago, defendants THOMAS J. MALONEY and ROBERT MCGEE, and WILLIAM A. SWANO together with others known and unknown to the grand jury, did commit and cause to be committed bribery, in violation of the Illinois Bribery Act, Illinois Revised Statutes, Chapter 38, Section 33-1; conspiracy to commit bribery, in violation of Illinois Revised Statutes, Chapter 38, Section 8-2; and conspiracy to commit extortion and extortion under federal law, in violation of Title 18, United States Code, Section 1951; in that defendants THOMAS J. MALONEY, ROBERT MCGEE, and WILLIAM A. SWANO did commit the following acts, any of which alone constitutes Racketeering Act 5:

(A) From in or about January 1986 to on or about June 27, 1986, at Chicago, in the Northern District of Illinois, defendants THOMAS J. MALONEY, ROBERT MCGEE, and WILLIAM A. SWANO and others known and unknown to the grand jury, did knowingly and intentionally conspire and agree to solicit, receive, retain, and

agree to accept approximately $10,000 pursuant to an understanding that they would improperly influence and attempt to influence the performance of an act related to the employment and function of a public officer, and committed an act in furtherance thereof; that is, that defendant ROBERT MCGEE would obtain approximately $10,000 from defendant WILLIAM A. SWANO and transmit it to defendant THOMAS J. MALONEY in order that defendant THOMAS J. MALONEY would corruptly fix the outcome of the case of the *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, by acquitting the defendants of murder in exchange for the $10,000 bribe; in violation of Illinois Revised Statutes, Chapter 38, Sections 8-2 and 33-1(d) and (e).

(B) Between on or about June 17, 1986 and June 27, 1986, at Chicago, in the Northern District of Illinois, defendants THOMAS J. MALONEY and ROBERT MCGEE solicited, received, retained, and agreed to accept from defendant WILLIAM A. SWANO approximately $10,000 pursuant to an understanding that they would improperly influence or attempt to influence the performance of an act related to the employment or function of a public: officer, that is, that defendant THOMAS J. MALONEY would corruptly fix the outcome of the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, by acquitting the defendants of murder in exchange for the $10,000 bribe; in violation of Illinois Revised Statutes, Chapter 38, Section 33-1(d) and (e).

(C) From in or about January, 1986 to June 27, 1986, defendants THOMAS J. MALONEY and ROBERT MCGEE did knowingly, willfully, and unlawfully combine, conspire, confederate and agree together and with each other

to commit extortion, which extortion would obstruct, delay, and affect commerce, as "extortion" and "commerce" are defined in Title 18, United States Code, Section 1951, in that they agreed among themselves to obtain approximately $10,000 from persons known to the grand jury, with their consent, such consent being induced under color of official right, in order to corruptly fix the outcome of the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555; in violation of Title 18, United States Code, Section 1951.

RACKETEERING ACT NUMBER 6

In or about 1989 and 1990, in Chicago, in the Northern District of Illinois, defendant THOMAS J. MALONEY did endeavor to obstruct the due administration of justice, in violation of Title 18, United States Code, Section 1503, in that defendant THOMAS J. MALONEY did commit the following acts, any one of which alone constitute racketeering Act Number 6:

(A) In or about the summer of 1989, in Chicago, defendant THOMAS J. MALONEY endeavored to obstruct the due administration of justice by instructing WILLIAM A. SWANO that he should refuse to cooperate in an ongoing federal investigation of bribery, and attempted bribery and extortion regarding the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, and by offering to provide WILLIAM A. SWANO with an attorney to represent him in that investigation; in violation of Title 18, United States Code, Section 1503;

(B) In or about June or July 1990, in Chicago, defendant THOMAS J. MALONEY endeavored to obstruct the due administration of justice by instructing WILLIAM A. SWANO that he should refuse to cooperate in an ongoing federal investigation of bribery, and attempted bribery, and extortion regarding the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555, and by offering to provide WILLIAM A. SWANO with an attorney to represent him in that investigation; in violation of Title 18, United States Code, Section 1503;

All in violation of Title 18, United States Code, Section 1962(c).

COUNT THREE

The SPECIAL OCTOBER 1990-1 GRAND JURY further charges:

1. The GRAND JURY realleges and incorporates by reference paragraphs 1, 2, and 3 of Count One of this indictment.

2. From in or about January 1986 to June 27, 1986, at Chicago, in the Northern District of Illinois, Eastern Division,

THOMAS J. MALONEY,
ROBERT McGEE and
WILLIAM A. SWANO,

defendants herein, together with others known and unknown to the GRAND JURY, did knowingly, willfully, and unlawfully combine, conspire, confederate, and agree together and with each other to commit extortion, which extortion would obstruct, delay, and affect commerce, as

"extortion" and "commerce" are defined in Title 18, United States Code, Section 1951, in that they agreed among themselves to obtain $10,000 from persons known to the grand jury with their consent, such consent being induced under color of official right, in order to corruptly fix the outcome of the case of *People of the State of Illinois v. Earl Hawkins and Nathson Fields*, 85 C 6555; in violation of Title 18, United States Code, Section 1951.

3. It was part of the conspiracy that on June 17, 1986, defendant ROBERT McGEE received $10,000 from WILLIAM A. SWANO on behalf of defendant THOMAS J. MALONEY in order for THOMAS J. MALONEY to fix the case.

4. It was part of the conspiracy that THOMAS J. MALONEY retained the $10,000 bribe until June 27, 1986, with intent to corruptly fix the case by acquitting Earl Hawkins and Nathson Fields of murder.

5. It was part of the conspiracy that on June 27, 1986, defendant THOMAS J. MALONEY returned the $10,000 bribe to WILLIAM A. SWANO in order to conceal and cover up the fact that THOMAS J. MALONEY had agreed to fix the murder case charged against Earl Hawkins and Nathson Fields;

All in violation of Title 18, United States Code, Section 1951.

COUNT FOUR

The SPECIAL OCTOBER 1990-1 GRAND JURY further charges:

1. The GRAND JURY realleges and incorporates by reference Count One of this indictment.

2. From in and about the summer of 1989 to in and about late June or early July 1990, at Chicago, in the Northern District of Illinois, Eastern Division,

THOMAS J. MALONEY,

defendant herein corruptly endeavored to obstruct the due administration of justice by instructing WILLIAM A. SWANO that he should refuse to cooperate in an ongoing federal investigation of bribery, attempted bribery, and extortion regarding the case of *People of the State of Illinois v. Earl Hawkins and Nathson Field*, 85 C 6555, and by offering to provide WILLIAM A. SWANO with an attorney to represent him in that investigation;

In violation of Title 18, United States Code, Section 1503.

A TRUE BILL:

/s/ Joan B. Donel
FOREPERSON

/s/ Fred Foreman
UNITED STATES ATTORNEY

FIRST SUPERSEDING INDICTMENT

No. 91-CR 477

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

THE UNITED STATES OF AMERICA

vs.

WILLIAM A. SWANO,
ROBERT B. McGEE and
THOMAS J. MALONEY

INDICTMENT

Violations: Title 18,
United States Code,
Sections 1503, 1951,
1962(c) and (d)

A true-bill,

/s/ Jean B. Daniel
Foreman

Filed in open court this 26th day of June, A.D. 1991

/s/ G. Stuart Cunningham
Clerk
By William A. Haynes

Bail, $ _____

EXHIBIT 3

24 (N) CHICAGO SUN-TIMES, WEDNESDAY, MARCH 24, 1993

Witness Couldn't Believe Cases Were Being Fixed

By Rosalind Rossi
Staff Writer

When a deputy sheriff first said he could help fix a case before former Criminal Court Judge Thomas J. Maloney, attorney William Swano didn't believe it, he testified Tuesday.

"I said, 'I find that hard to believe,' " Swano, 46, said during Maloney's trial on charges of fixing five cases as a Criminal Court judge. "Judge Maloney was so prosecution-oriented. . . . I wanted to hear it from the horse's mouth."

So, Swano said, Deputy Sheriff Lucius Robinson agreed to set up a meeting. Within a week, Swano said, he and Robinson met Maloney in a hallway outside Maloney's courtroom and Swano popped the question to Maloney:

"I said, 'Lucius said you can help me with this case up here. Is that right?' . . . He [Maloney] said, (He's my guy. Deal with him.' "

As Maloney stood by, Swano said, he gave Robinson a pre-arranged sum of $2,000 to fix a murder case against Swano's client, Wilfredo Rosario. Swano said he gave Robinson a final $500 payment on Oct. 17, 1980.

About two months later, Swano said, Maloney "nullified the state's case" against Rosario by throwing out

Rosario's confession. Five months after that, he said, Maloney acquitted Rosario after a bench trial.

Swano, 35, was describing his first allegedly corrupt experience with the judge as the government's key witness against Maloney, 67, now retired, and attorney Robert McGee, 51, who is accused of acting as Maloney's "bagman" in three cases. Defense attorneys contend that Swano is trying to "save his hide" and cannot be believed.

Swano indicated he was so confident of one fix he had arranged in a murder case before Maloney that he bet the prosecutor, Richard Stock, $5 he could win a voluntary manslaughter conviction. He won the bet.

Swano, a former assistant public defender and member of the office's murder task force, said he went into private practice in 1979. That year, he said, he talked to Robinson, who had a reputation as "the bagman" for Judge Maurice Pompey, then sitting in a preliminary hearing court for murder and sex cases.

One day, Swano said, he was telling Robinson about a client charged with a date rape when Robinson "asked me if I wanted some insurance." At first, he said, he did not understand what Robinson meant, but then realized Robinson was offering to fix the case.

"I asked him what the premium was. . . . He said '$200.' . . . I told him I'd meet him out in the hallway." There, Swano said, he paid Robinson $200 and Pompey threw out the charges. It was his first fix.

In 1982, Swano said, he paid Robinson $2,000 to win a "highly unusual" probation and work release sentence

from Maloney in the case of Ronald Roby, charged with five felonies involving credit card fraud.

Also in 1982, Swano said, he started to fix a murder case with Robinson, but McGee approached him and said Maloney thought Lucius was "too hot" and wanted McGee as his intermediary. Said Swano: "I was happy. I found it more comfortable to deal with a lawyer than a sheriff, especially a lawyer who had a friendship . . . with the judge."

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel ROGER COLLINS,	)	93 C 5282
Petitioner,	)	93 C 5328
v.	)	Chicago, IL
GEORGE WELBORN, Warden, Menard Correctional Center,	)	April 8, 1994 10:00 a.m.
Respondent	)	Hearing

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE WILLIAM T. HART

* * *

[7] BY MR. EBERHARDT:

over 150 witnesses, many of them being gang members, were brought before the federal grand jury.

After those 150 members were brought before the grand jury, that is when all of a sudden there was this triple homicide under the viaduct at Clark and Roosevelt, and the Marquette 10, one of the drug dealers was killed after he had appeared before the federal grand jury.

Do we know that in fact there is a link at this point?

No.

Is it incumbent upon us to check to see if there is a link?

Yes, it is incumbent upon us to do that because Mr. Collins is actually innocent of the charges.

We know that somebody committed those crimes. We feel that either the federal government or some branch of the state government has information that has not been provided that would help us in determining the issues here.

The Greylord and the Gambat investigations of Judge Maloney, I think it has been made perfectly clear, it has been made perfectly clear at least to me after speaking to one of the attorneys involved and one of the witnesses involved in the Maloney prosecution, the thrust of the government in their case against former Judge Maloney was he was known as a hard-hitting prosecution-oriented judge unless [8] he got paid, and what he did is that he made sure that all the calls, all the discretionary calls, everything went in favor of the State unless he got paid. That obviously was to the detriment of Roger Collins when he looked at the discretionary rulings of Thomas Maloney that were made in this case.

Was there potentially some overreaching on the part of the prosecutor's office?

What we found and what I suggest is interesting to the court that might talk about or might give some insight into their motivations; on February 21st of 1981, the arrest occurred and the prosecution.

On February 23rd of 1981, witnesses were brought before the grand jury, and on February 25th, 1981, in the Chicago Tribune, Mr. Daley announced the formation of the gang crimes prosecution unit with Mr. Owen being placed in charge.

Now, this occurs after a homicide that occurred in November of 1980, the fact that everything ground to a screeching halt after witnesses were brought to the polygraph examiner's office after police thought that other people were involved based on the results of the polygraph examinations, and then all of a sudden in January the FBI steps into the Arizona prosecution and all of a sudden in February we have the arrest of Mr. Collins, Mr. Bracy, Hooper

* * *

[58] BY MR. LEVY:

exhaustion would be futile because it is time barred, and if you would, I think it would be better to explore that a little bit further with my co-counsel, Mr. Carlson. He is more familiar with the Illinois post-conviction statute than I am, but it is our position that it is not – it is not subject to an exhaustion requirement because exhaustion would be futile.

Moving on to the Judge Maloney issue, it is uncontroverted that at this point, based upon Judge Maloney's conviction in this court, that Judge Maloney was engaged in a pattern of corruption which began prior to the time that he sat as the trial judge in the Bracy and Collins matter.

The issue is whether or not there is prejudice as opposing counsel correctly points out in his reply papers.

We are not conceding that we would have to show prejudice, but assuming that we do, we would like some additional opportunity to demonstrate that the pattern of corruption in which Judge Maloney was engaged

impacted his judicial behavior not only in the cases where he got bribes but also in the cases where he didn't get bribes.

Counsel for Mr. Collins has suggested to you one way in which it might have affected his behavior in these other cases. Another possible suggestion was he was extra tough in the cases where he didn't get bribes as kind of advertising, sort of the idea that if you don't pay me then I [59] am going to really come down on your client.

At this point, Judge Hart, we are obviously not in a position to prove that, but we believe that with some reasonable opportunity to investigate we may be able to, and at this point we just haven't had the opportunity to investigate.

What would we do?

We would want to look at the transcript from Judge Maloney's trial. We might want an opportunity to interview or depose some of those persons and witnesses who were most intimately associated with Judge Maloney who may be able to provide material information on his behavior in the cases where he didn't get bribes.

We would like to do an analysis of Judge Maloney's rulings, or a pattern of Judge Maloney's rulings to see how he exercised his judicial discretion in a large number of cases that were assigned to him to see if there is any noticeable or discernable patterns.

We don't want to go on a wild goose chase, your Honor, we don't want to reinvestigate Judge Maloney from square one. We believe that most of that information

has been assembled and is in existence as part of the presently-pending prosecution in this court, and if we could simply be given some reasonable access to those materials, we may well be able to make the showing of prejudice that possibly we may [60] need to make in order to connect up the pattern of corruption with Judge Maloney's behavior in this particular case.

In summary, the ruling that we are asking from you today with respect to the Nellum recantation and Judge Maloney claims is we are asking you to rule that these claims are not defaulted, that you do have jurisdiction to hear these claims, and that you give us some reasonable additional opportunity to investigate these claims. What we would propose to do in connection with the investigation issue is to try and provide to the court an expeditious and economical discovery plan which within a reasonable period of time would give us the opportunity to provide the additional information to this court.

That is my presentation, unless you have any questions.

THE COURT: No, sir.

Thank you.

I think what I will do is break until 1:30, just an hour, and then we will get back at it at 1:30.

MR. LEVY: Thanks very much.

(Court recessed to 1:30 p.m. of the same day, 4/8/94.)

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[62] THE CLERK: 93 C 5282, Collins v. Welborn.

THE COURT: All right, we will resume.

MR. CARLSON: For the record again, I am Martin Carlson on behalf of Mr. Bracy.

I would like to begin with the point Mr. Levy made about the court's question about shouldn't we be back at state court on the Maloney claim and the Nellum claim.

The problem with that is that we don't believe we have a viable state court remedy at this point in view of the Illinois statute of limitations for post-conviction petitions. Originally it was within ten years of the date of conviction. It has been amended and is currently three years following the date of conviction or six months following the denial of certiorari of the direct appeal.

Obviously the information we are relying on in the Judge Maloney and Morris Nellum issues was discovered well after the applicable period would have run as to Mr. Collins and Mr. Bracy.

I would note to the court the case of Harris v. DeRobertis. I don't believe it has been cited in any of the briefs, but at 932 F.2d 619 in which the 7th Circuit noted the fact that while there is a savings provision of the statute of limitations saying that an untimely petition may be allowed if the petitioner can show no culpable negligence. The court of appeals noted that that provision has almost [63] never been successfully invoked, and in DeRobertis – or Harris, they held that they will not find available state remedies and will not send a petitioner back to state court unless there is direct precedence from the state courts that on those facts they would in fact waive the limitations period.

In any event, we believe that our case, there was already one petition filed. Illinois also has a presumption against successor post-conviction petitions, so we feel we really don't have an adequate state remedy as to those issues at this point and they are properly before this court.

As Mr. Levy pointed out, as to those two issues we feel there is no procedural default problem because we can show cause by virtue of the fact that the claim was not reasonably available to us until –

THE COURT: Why wasn't it available?

MR. CARLSON: Well, the evidence on which we are relying, Judge Maloney's conviction, and the evidence that came out there didn't become public until I believe it was April or early '93 and the post-conviction appeal in the Illinois Supreme Court was concluded before that information became public.

Mr. Echeles did try to get before the Illinois Supreme Court the fact that he had been indicted, that Judge [64] Maloney had been indicted. The court denied his motion to stay the proceedings and refused to allow him to supplement the record with any information concerning Judge Maloney.

Of course, the indictment itself would not have established the claim because at that point in time Judge Maloney was contesting all the allegations and we don't believe that until the evidence came out at his trial that the evidence existed for us to present the current claim.

THE COURT: As far as you know, however, there is nothing that came out of this trial that directly connects to this case – or is there?

MR. CARLSON: As far as we know, but, again, we are asking for a chance to review the transcript of that proceeding.

Similarly the Morris Nellum claim, the recantations – he was not located and did not begin making his recantations until well after the post-conviction petition in the trial court had been dismissed. Again, Mr. Echeles tried to raise that in the Illinois Supreme Court by way of a motion to stay the proceedings. This was after his opening brief had been filed and after the State had filed their briefs. It was really untimely under Illinois appellate procedure, so that was also not an adequate opportunity to raise it in the state courts.

I want to address several other issues that we

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[93] BY MR. ZICK:

up with these guns at the last minute, I can't understand – I was confused as to what would have been the purpose of suddenly dumping those guns in late June or early July for finding when it was in fact the woman's gun. She testified at trial that Bracy told her that the gun had been used in a crime and then disposed of. He said the river. Maybe he said the lake. Maybe she misheard. She did testify to a body of water, was the final resting place for that gun.

Moving on to Mr. Levy's presentation, the Nellum recantation that he is attempting to present before the

court, we point out quite clearly U.S. ex rel. Miller v. Pate, recantation testimony, of course, should be judged very harshly, should be very seldom a basis for habeas relief, it should be viewed with great suspicion. This man has sat on one version of the facts now for over a decade and suddenly is coming forward. I think that should be judged and given the weight it deserves, which is exactly none.

Again, the 1992 statement that he obtained from Mr. Nellum, that, of course, falls under that Keeney v. Tamayo-Reyes bar. This is a new fact-finding that was not in existence at the time of the state court proceedings but it could have been and as such, it is simply barred for habeas review at this point.

As to Judge Maloney and his criminal case that was pending at the time, I think it is worth bearing in mind [94] that the petitioners had not been able to, and you brought this out in a question yourself, had not been able to link one unfavorable ruling or favorable ruling or anything. All we have here is a general smear campaign. This judge was later convicted. It happened at about this time or while this trial was going on apparently. He was accepting bribes in some criminal cases. We don't have anything more concrete than that, and I think if the court were to use that as a basis for issuing habeas relief, I think then it would force – you would have to vacate every judgment he ever entered while he sat as a judge, without anything more concrete, anything linking Judge Maloney to improper rulings or corruption or bribery in this case, none of which they have been able to even allege really, let alone demonstrate, there simply is no

justification for entertaining Judge Maloney's status as a criminal suspect.

As to Mr. Carlson's presentation, the Maloney and Nellum issues, it is true, exhaustion is one issue, and because of statutes that have run or whatever, it is now no longer feasible, it is not currently possible for this petitioner to seek post-conviction relief in the circuit courts. The fact remains, though, that these could have been raised at the time and the claims were available in the state court at the time, so then we turn to the question of procedural default. They could have been raised but weren't. [95] The fact that the remedy is no longer currently available is really irrelevant to that equation and for those reasons I think that the procedural default still quite clearly bars the court from reaching the merits.

If I could just briefly return to the Judge Maloney issue again, as an example of that, our Rule 5 submissions 2(d) of the state court materials that were filed with the court, there is a copy of that motion to stay the proceedings and, true, at the time the motion was made he was only under indictment and there had not been a conviction, but that does show that there was an awareness of that proceeding, and as I noticed before, the Supreme Court's opinion on post-conviction did not come down until 1992, at which time Judge Maloney's conviction was long over and I presume his appeal was as well. There was really nothing to stop the Maloney information from being brought out during the post-conviction as well.

As to the charge that the trial court refused a continuance for the death penalty hearing: Now, the claim is raised solely in the context of ineffective assistance of

counsel claim. By the denial of this motion, in other words, counsel was rendered ineffective and he could not bring in the witnesses that he could have used.

We have to remember though that he did not raise this claim in this context under the appeal. If you

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. ROGER COLLINS #A-02120, Petitioner, v. **GEORGE WELBORN**, Warden, Menard Correctional Center, Respondent.	No: 93 C 5282 The Honorable William T. Hart Judge Presiding

PETITIONER'S SUPPLEMENTAL MOTION FOR DISCOVERY

NOW COMES Petitioner, ROGER COLLINS, by and through his attorneys, STEPHEN E. EBERHARDT and ROBERT H. FARLEY, Jr., pursuant to Rule 6, Rules Governing Section 2254 Cases in the United States District Court, and Rule 26, Federal Rules of Civil Procedure, and moves this Honorable Court for an order granting Petitioner leave to conduct discovery. In support of this motion, Petitioner states as follows:

1. On March 24, 1994, Petitioner filed a SUPPLEMENT TO PETITION FOR WRIT OF HABEAS CORPUS wherein Petitioner claimed that certain improprieties on the part of former Judge Thomas Maloney deprived Petitioner of a fair trial.

2. On June 2, 1994, the United States Government filed a PROFFER OF THE GOVERNMENT'S EVIDENCE

IN AGGRAVATION AND MEMORANDUM SUPPORTING CONSIDERATION OF PROFFERED EVIDENCE in the case of *United States v. Maloney*, 91 CR 477-1 certain parts of which are attached hereto.

3. The Government's proffer makes clear that " . . . Thomas Maloney's life of corruption was considerably more expansive than proved at trial."

4. A Government witness in the Maloney case has advised counsel for Petitioner that co-defendant Bracy's trial attorney was a former partner of Thomas Maloney.

5. For all the reasons previously argued and briefed before this Court, Petitioner's claims need to be fairly and adequately investigated before disposition of his Writ of Habeas Corpus.

WHEREFORE, Petitioner seeks an order of this Court opening discovery.

Respectfully submitted,
ROGER COLLINS

By: /s/ Stephen E. Eberhardt
One of his Attorneys

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	
	)	No. 91 CR 477-1
v.	)	Judge Harry D.
	)	Leinenweber
THOMAS J. MALONEY and ROBERT McGEE	)	
	)	

PROFFER OF THE GOVERNMENT'S EVIDENCE IN AGGRAVATION AND MEMORANDUM SUPPORTING CONSIDERATION OF PROFFERED EVIDENCE

(Filed Jun. 2, 1994)

The UNITED STATES OF AMERICA, by JAMES B. BURNS, United States Attorney for the Northern District of Illinois, hereby presents its evidence in aggravation at sentencing and its memorandum supporting consideration of that evidence.

To place this case in context, in most of the judicial corruption prosecutions seen previously in this district, Cook County Circuit Court judges have been convicted and sentenced for taking bribes in relation to their service in the preliminary hearing, misdemeanor, or traffic courts. In fact, the *Maloney* case is the first instance in which a jury has convicted a Cook County Circuit Court judge of bribery-related criminal activity in the felony trial courts. But that dubious distinction does not begin to describe the level of criminal conduct here. Never before this case has a judge in this district (or possibly in this country) been charged with or convicted of fixing even

one murder case. Judge Thomas Maloney now stands convicted of fixing ***three*** such cases.[1]

The range of possible punishment arising out of the Sentencing Guidelines calculations in this case is based *solely* upon the evidence presented at trial: the jury's conclusion that Judge Thomas Maloney took bribes to fix the *Chow, Jones,* and *Hawkins* murder cases and that Robert McGee served as his bagman with respect to the latter two payoffs.[2] The government urges this court to rely upon the new, additional evidence in aggravation outlined in this sentencing submission to sentence defendant Thomas Maloney to the upper end of the applicable guideline range, that is, 293 months in the custody of the Bureau of Prisons.[3]

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[1] The jury in fact also heard evidence that Maloney fixed a fourth murder case, *People v. Rosario*. Because the indictment did not specifically charge this case fix, the jury was not asked to decide whether Judge Maloney committed bribery on this case in the special verdict form it completed at trial.

[2] Of course, the jury also convicted Maloney of fixing the *Roby* case and of obstructing justice. Because the bribery Guidelines operate in large part to peg the guideline range by referencing the severity of the offenses underlying the bribery, the murder cases which Maloney fixed play a greater role in the calculation of the applicable guideline range than does the *Roby* case, which charged deceptive practices.

[3] That the government does not here move for an upward departure is entirely a function of the fact that the sentencing guideline range arising out of the evidence produced to date in this case is rather severe, even in the absence of the proof in aggravation. That notwithstanding, the seriousness of the proof in aggravation certainly merits a quantum of additional punishment, most fairly handled by meting out a sentence at the upper end of the guideline range.

The first section of this submission delineates the evidence the government intends to offer in aggravation at the time of sentencing in this case. Next, the government offers a thorough statement of the existing case law supporting this court's consideration and reliance upon that proof in fashioning a sentence for the defendants in this case.

I. Evidence in Aggravation

A. Summary of Evidence in Aggravation

In essence, the additional evidence that the government seeks to introduce at sentencing will establish that, although difficult to imagine, Thomas Maloney's life of corruption was considerably more expansive than proved at trial.

Specifically, the government's sentencing evidence will show that Maloney's criminal history began with bribe payments he made to Cook County court personnel and judges on a systematic basis during his years as a criminal defense attorney; that in that capacity, Maloney made the initial contact to Pat Marcy to fix the result in the state murder case against La Cosa Nostra hitman Harry Aleman which led to the bribery of Judge Frank Wilson and the acquittal of Aleman in a 1976 bench trial before Wilson; that Maloney was closely tied to the La Cosa Nostra prior to his appointment to the bench and that major organized crime figures looked forward to Maloney's appointment as an opportunity to have a "good friend" on the bench; that after his elevation to the bench, Maloney continued his close First Ward/organized crime connections, fixing the results of a several

murder cases of import to organized crime, including *People v. Lenny Chow* and *People v. Anthony Spilotro* in which Maloney completely acquitted the defendants; and that Maloney engaged in substantial additional bribery using Robert McGee as his bagman.

On this last point, the government also seeks to present proof that in the capital murder case of *People v. Dino Titone*, initial discussions regarding a fix arrangement (to be handled through Robert McGee) fell through and Maloney convicted the defendant in a bench trial and sentenced him to death. Finally, as to Robert McGee, the government seeks to present additional proof that McGee fixed another criminal case, named *People v. Samuel Gracia*, before former Cook County Circuit Court Judge Wayne Olson.

B. Maloney Paid Bribes to Fix Cases as an Attorney

Prior to 1977, defendant Thomas J. Maloney was a criminal defense attorney practicing law in Chicago, Illinois. Between approximately 1975 and June 1976, defendant Robert McGee worked as an attorney in Maloney's firm. In June 1976, Maloney was appointed as a judge in the Criminal Division of the Circuit Court of Cook County. McGee continued his criminal defense practice after Maloney's appointment to the bench.

The government seeks to introduce proof that prior to becoming a judge in 1976, defendant Thomas Maloney paid cash bribes to Cook County Circuit Court personnel. Maloney paid or caused to be paid cash bribes to several Cook County Circuit Court judges to fix the results of

cases he handled before them. On this score, the government seeks to introduce four categories of proof, that is, that defendant Thomas Maloney: (1) paid cash bribes to Judge Maurice Pompey by using Cook County Deputy Sheriff Lucius Robinson as an intermediary; (2) paid cash bribes to Robinson to influence the performance of Robinson's official duties; (3) paid cash bribes to fix cases involving one of Maloney's clients, Michael Bertucci; and, (4) approached Pat Marcy to help orchestrate the fix in the murder case, *People of the State of Illinois v. Harry Aleman*.

1. Defendant Maloney's Bribe Payments to Lucius Robinson and Judge Maurice Pompey

In the 1970s, while a practicing criminal defense attorney, Maloney paid numerous cash bribes to Lucius Robinson. Some of these bribes were paid to Robinson for the purpose of influencing Robinson's activities within the court system. Other bribes were paid by Maloney to Robinson for the purpose of passing them on to Cook County Circuit Court Judge Maurice Pompey.

Maloney had numerous cases before Judge Pompey at that time. On several occasions Maloney gave Robinson newspapers or file folders containing a cash-like bulk in the center to pass on to Judge Pompey. On other occasions Maloney gave Robinson envelopes which contained a cash-like bulk to give to Judge Pompey. Robinson could tell the newspapers, file folders and envelopes contained quantities of cash, but could not tell how much. On occasion, Robinson looked inside the containers and saw that the bulk was indeed cash. Robinson in turn gave

the newspapers, file folders and envelopes to Judge Pompey by either giving them to the judge directly or by leaving them in Judge Pompey's office and then telling the judge about them.

Approximately one time per month Maloney also gave Robinson cash ranging from $5.00 to $30.00. Maloney gave this money to Robinson in exchange for tasks such as getting court continuances and having Maloney's cases placed on a later call.

2. Cases Involving Michael Bertucci as a Client of Attorney Thomas Maloney

Between 1968 and the mid-1980s, the State of Illinois prosecuted Michael Bertucci for numerous offenses. Defendant Thomas Maloney represented Bertucci in many of these matters. Maloney repeatedly told Bertucci that he would pay the judges assigned to Bertucci's cases in order to fix the particular case's outcome. Bertucci paid to Maloney extra money in cash to this end. The specific cases involving Bertucci are described below.

Bertucci first met Maloney in approximately 1968 through Johnny Cox, the son-in-law of organized crime lieutenant Shorty LaMantia.[4] In 1968, Bertucci and Cox were arrested on a narcotics charge and Shorty LaMantia arranged for Maloney to represent them. LaMantia, who paid Maloney's fee in the case, told Bertucci that Maloney was a "fix" lawyer and that Maloney would arrange to

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[4] Shorty LaMantia was a lieutenant in the street crew Angelo LaPietra ran on Chicago's near south side.

have the case thrown out. Indeed, the court later dismissed the case.

In approximately 1970, the police arrested Bertucci and one Johnny Mollo on a possession of stolen goods charge. Maloney represented both Bertucci and Mollo in the case. On one occasion, during a meeting in Maloney's office, Maloney told Bertucci and Mollo that the case against them was a heavy one and that they would have to pay him more money. Bertucci suggested they get another lawyer on the case. Maloney became angry and stated, "Don't worry, I'll fix the cases, if you come up with the money. And don't ever talk to me again about other lawyers in my office." Each time Bertucci met with Maloney on the case they paid him between $500 and $1,500 in cash. The judge eventually threw out the stolen goods charge.

In 1973, Bertucci was charged with the unlawful sale of firearms. The case was assigned to Judge John Murphy.[5] Maloney represented Bertucci in the case and told him not to worry because "the fix is in." Later, when Bertucci appeared in court one day in connection with the case, Maloney told Bertucci that when the judge called a recess to stay in the courtroom and to wait for everyone else to leave. When the judge called a recess, Bertucci waited as the courtroom emptied. The judge suddenly returned to the empty courtroom and called Bertucci's case and the names of the police officers involved. The police officers, who had left the courtroom when the

[5] Judge Murphy was later convicted as a part of the Greylord prosecutions.

recess was called, did not respond and Murphy dismissed the case.

In the first half of the 1970s, Maloney represented Bertucci on a case before Judge Maurice Pompey in the courthouse at 61st and Racine Avenues. During a court recess in the case, Bertucci went to the men's room and was standing near a window when Maloney and then Judge Pompey entered the men's room. Everyone else in the room left. Maloney walked over to Judge Pompey and handed him an amount of cash. When Bertucci returned to the courtroom after the recess, Judge Pompey dismissed his case.

In approximately 1977, Bertucci was charged in Will county with armed robbery. An attorney named Charles Bellows represented Bertucci. Maloney represented Bertucci's co-defendant. Bellows is now deceased. During the pendency of the case, Bertucci heard Maloney tell Bellows that he (Maloney) was to become a judge but that he did not want to because he was making more money as a lawyer.[6]

[6] In fact, conclusive proof exists that defendant Maloney was well aware that his assignment to the bench was going to cause a significant reduction in his annual income. In a Chicago Bar Association questionnaire Maloney completed just prior to assuming the bench, Maloney stated that his judicial salary would be "substantially less" than his private practice income. (Exhibit 1).

3. People of the State of Illinois v. Harry Aleman

In December 1976, the State of Illinois charged Harry Aleman, one of the top La Cosa Nostra hitmen in Chicago, with murder in relation to the shotgun shooting of a man named Billy Logan in the Chicago area. The state's case was a strong one, for two entirely independent witnesses identified Aleman as the killer. One was a mafia underling named Louie Almeida, who drove Aleman to the location of the killing. More importantly, however, the second was an entirely innocent citizen who just happened to be out walking his dog and saw Aleman shoot the victim. Despite the strength of the state's case (or possibly because of it), Aleman's criminal defense lawyer, Thomas Maloney, set the wheels in motion to pay-off the judge to get an acquittal on the case.

In the Aleman *case*, Judge James Bailey was the first judge assigned to the case. Judge Bailey was widely respected as a no nonsense law and order judge. One of the first things attorney Tom Maloney did in handling the defense of Harry Aleman's case was to file a Motion for Substitution of Judges (SOJ), listing Bailey and another. pro-prosecution judge, Judge Frank Wilson, as the two judges whom Maloney and Aleman wanted to avoid. The SOJ Motion stated in pertinent part that Harry Aleman "will not receive a fair trial if he is tried before [Judge Wilson] because said judge is prejudiced against him." *People v. Aleman*, SOJ Motion (attached as Exhibit 2). The case was then reassigned to Judge Fred Suria, widely acknowledged as an honest judge.

Maloney was not going to take any chances with the case of his infamous client. Aleman had been indicted in mid-December 1976 and shortly after the turn of the year, Maloney contacted Pat Marcy to ask for his assistance in fixing the *Aleman* case.[7] Thereafter, Pat Marcy met with Robert Cooley at Counselor's Row Restaurant to arrange the *Aleman* fix. Marcy asked Cooley whether he knew of a judge at the 26th & California courthouse who could handle – *i.e.*, fix – a very serious murder case involving Harry Aleman.[8] Cooley told Marcy that after he got a chance to look at the case file/police reports, he would check.

Upon reviewing the *Aleman* case materials, Cooley thought of several judges who he might contact on the case, the first being Frank Wilson. Cooley had become friendly with Judge Wilson drinking and gambling. Cooley believed that Wilson's reputation as a state-minded judge would benefit a fix by diverting attention, the public thinking that *this* judge would never fix a case. Cooley talked with Judge Wilson several times about the Aleman case. When Cooley first discussed the fix with Judge Wilson, the judge pointed out that he had been "SOJ'd" on the case, referring to the SOJ motion Tom Maloney had filed. Judge Wilson strongly questioned whether Cooley could get the case assigned to him over

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[7] Very significantly, the government anticipates calling *multiple* witnesses to testify that Tom Maloney contacted Pat Marcy to arrange to pay cash for an acquittal in the *Aleman* case.

[8] Although Cooley did not then know Harry Aleman personally, Cooley knew him by reputation and had seen him meet privately on several occasions with Pat Marcy at Counselor's Row Restaurant.

the SOJ. Cooley assured Judge Wilson that he could and asked whether Wilson would fix the case if Cooley could arrange for the assignment.

Judge Wilson eventually agreed to fix the case for $10,000. Judge Wilson told Cooley, however, that he would not agree to the fix unless Tom Maloney agreed to get off of the case. Wilson was concerned that it would look suspicious if the same lawyer who had named Wilson as a judge who couldn't give his notorious client a fair trial suddenly withdraws that statement, the case is then mysteriously shifted to Judge Wilson, whereupon the defendant waives a jury and obtains a not guilty in a bench trial before Judge Wilson. Judge Wilson also said that he wanted Maloney to be the one to withdraw the SOJ motion in open court. Once Wilson agreed to handle the fix, Cooley immediately paid him $2,500.

Cooley quickly met with Pat Marcy and told him that Wilson had agreed to fix the case. Cooley said that Judge Wilson questioned whether they could really get the case assigned to him over the SOJ order barring Judge Wilson from the case. Marcy assured Cooley he could do this. Cooley also told Marcy that Judge Wilson did not want Tom Maloney to represent Aleman because it would look too suspicious.

At about this time, Cooley also met with Harry Aleman at the King's Inn Restaurant on Mannheim Road. Aleman asked Cooley if he was sure he could get a not guilty result in the case. After Cooley said he was, Aleman responded that Cooley better be right. Aleman told Cooley that Maloney wanted to stay on the case and that Maloney was upset because, after going to Marcy to fix

the case, Maloney now was going to be dropped from the case himself. Aleman also told Cooley that Maloney was "with us," – i.e., organized crime – that he can be trusted, that Maloney was going to be appointed as a judge and that the case was to be one of his last cases before he became a judge. Aleman further stated that once Maloney became a judge he would be a good friend to have on the bench.

Cooley then met again with Pat Marcy and related Aleman's comments about keeping Maloney on the case. Marcy too asked Cooley to press Judge Wilson to allow Tom Maloney to remain on the case. Cooley maintained that Judge Wilson opposed this. Ultimately, Pat Marcy found another lawyer to take over the case, a semi-retired attorney named Frank Whalen.

But first the case had to be shifted to Judge Wilson, a highly suspicious course of events which itself lends credibility to the government witnesses' testimony regarding Maloney's participation in the *Aleman* fix. On February 23, 1977, Tom Maloney filed a Motion for Substitution of Judges for Cause, curiously citing remarks Judge Suria made at the time of the bail hearing in the case some 6 weeks earlier. On March 8, 1977, Judge Suria ruled on the motion. As Judge Suria's comments at the time make clear, Judge Suria himself found the motion to be baseless, for he denied the motion as untimely and commented on the odd circumstances attending the motion:

Judge Suria: There is a motion pending, motion for substitution of judges. I had set it today for argument and/or hearing or presentation of any evidence. I would bar both sides

> from offering any evidence in that regard. I would note that the motion is for substitution of judges for cause is [sic] untimely in that the major, ah, facts giving rise to prejudice occurred on the date that I set bail and on this cause was January 7, 1977. Over six weeks later then there was a motion for substitution of judges for cause which in effect arose out of, ah, what the, ah, defense feels my conduct was and my comments were at that time. So I would respectfully deny the defendant's motion. . . .

People v. Aleman, Tr. 3/8/77, at 2-3.

Notwithstanding this ruling, because the defendant had opined in the SOJ motion that he felt he could not get a fair trial before Judge Suria, Judge Suria decided on his own to step off the case. Judge Suria noted that he'd so notified the Chief Judge, who advised Judge Suria of the name of the judge was would be taking Suria's place on the case . . . Judge Frank Wilson:

> Judge Suria: If the defendant feels he can't get a fair trial here, I will recuse myself, gentlemen. I have already so notified the Chief Judge. He has advised me that the matter will be transferred to Judge Frank Wilson in the building.

People v. Aleman, Tr. 3/8/77, at 3.

That same day, the state court half sheet in the *Aleman* case reflects the matter being reassigned from Judge

Suria to Judge Frank Wilson. (Exhibit 3).[9] It was not until March 22, 1977 – 2 weeks *after* the assignment to Wilson – that Tom Maloney first filed a motion on behalf of Harry Aleman to remove the name of Judge Frank Wilson from his original SOJ motion.[10] Maloney filed this motion before Judge Wilson, who granted it. That same day, Tom Maloney also complied with the second of Judge Wilson's fix provisos and filed his motion to withdraw from the *Aleman* case.

From May 16 to May 24, 1977, Judge Frank Wilson presided over the bench trial in *People v. Harry Aleman*. At the conclusion of the proof, Judge Wilson found Aleman not guilty of murder. After the case, Pat Marcy gave Robert Cooley an envelope containing $7,500, which Cooley delivered to Frank Wilson in payment for the not guilty.[11]

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[9] Two very significant points evident from records of the court reveal this action to be highly suspect: 1, as of this time, the court's order (on defendant's SOJ motion) barring Frank Wilson from sitting on the *Aleman* case as was still in effect; and 2, the case went to Frank Wilson even though there were 12 other judges at 26th & California who also heard felony trials in May 1977.

[10] The only proof of such a motion appears on the Circuit Court half sheet for the Aleman case. (Exhibit 3). The Cook County Circuit Court file on the *Aleman* case does not contain any written motion from Maloney seeking to have the name of Judge Wilson removed from his original SOJ motion. There also exists no record of what Maloney might have said by way of an oral motion in this regard, for the court reporter has certified that her request for a search for her stenographic notes of that proceeding led to the answer that no such notes exist.

[11] During the government's investigation using Cooley as an undercover operative, Cooley visited Judge Wilson in

Just as Harry Aleman had predicted, Tom Maloney was appointed to the bench on June 15, 1977, very shortly following the conclusion of the *Aleman* case.

C. Additional Cases Maloney Fixed as a Judge: People of the State of Illinois v. Anthony Spilotro

Just as Harry Aleman had opined, upon being named to the bench, Tom Maloney did prove to be a "good friend" to organized crime. The jury in this case has already convicted Maloney of bribery in the case fix for Chinese organized crime interests in *People v. Lenny Chow*. And, in 1983, Maloney did the same for Aleman's brethren, the La Cosa Nostra, in the case of *People v. Anthony Spilotro*.

In 1983, the State of Illinois obtained an indictment charging La Cosa Nostra boss Anthony Spilotro with the murders of James Miraglia and William McCarthy.[12] The case was assigned to Judge Thomas Maloney. One of

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Arizona to try to engage him in discussion regarding the *Aleman* fix. Wilson, by then retired, did not deny fixing the case though he denied accepting money. Shortly thereafter, Wilson made inquiries as to whether Robert Cooley was cooperating with federal authorities. When Cooley's undercover activities ended the following year, federal agents visited Wilson, informed him that Cooley had been cooperating with them for some time, and then confronted Wilson with the information Cooley had provided about the fix in the *Aleman* murder case, urging Wilson to cooperate with the federal investigation into his activities. Wilson told the agents he would think about it. Tragically, within the month, Wilson committed suicide.

[12] Anthony Spilotro was himself the victim of a mob hit some 3 years later, in 1986.

Spilotro's attorneys in the case was Herbert Barsy. Of course, Barsy was no stranger to case fixes in Maloney's courtroom. About two years earlier as part of the fix arrangement in Chow. Maloney had insisted that Barsy be brought in to handle the Chow court proceedings instead of Robert Cooley. Significantly, a review of computer printouts listing all of Barsy's felony cases before Judge Thomas Maloney reveals that **Barsy obtained not guilty results in all six of the cases he had before Judge Maloney.**

In 1983, during the pendency of Spilotro's case, Robert Cooley saw Barsy and Spilotro in the Counselor's Row Restaurant. Cooley then observed Barsy leave the restaurant and Spilotro go into the back of the restaurant with Pat Marcy. Spilotro and Marcy were gone for approximately five-to-ten minutes. When they returned, Cooley observed that Spilotro appeared to be upset. Spilotro then began a conversation with other persons in the restaurant besides Marcy. Later, Cooley opined to Marcy that Spilotro appeared nervous. Marcy told Cooley that Spilotro had a case up with the same guy with whom Cooley had had a problem and added that Spilotro had nothing to worry about because he (Marcy) "had taken care of it." Cooley understood Marcy's reference to "the guy" with whom Cooley had had a problem to reference defendant Thomas Maloney and Cooley's experiences with Maloney in the *Aleman* and *Chow* cases. Shortly thereafter, Cooley learned that Spilotro had a murder case up before Maloney.

On October 24, 1983, Spilotro waived his right to a jury trial and the bench trial before Maloney began. Three

days later, on October 27, 1983, Maloney found Spilotro not guilty of the murder charges against him.

D. Other Judicial Conduct in Aggravation: **People of the State of Illinois v. Dino Titone**

In *People v. Dino Titone*, Dino Titone was charged with murder and the state was seeking the death penalty. A lawyer named Bruce Roth served as defense counsel for Titone. Roth, himself since convicted of RICO bribery and sentenced to 10 years' imprisonment, informed Titone and his family that he could fix the result of the *Titone* case with Thomas Maloney through the payment of a bribe to **ROBERT McGEE**. The fix ultimately did not go through and Maloney convicted Dino Titone of murder in a bench trial and sentenced him to death. Very significantly, it was in 1990 that Titone's father first informed the government that Roth had named McGee as Maloney's bagman in the aborted fix in the *Titone* case, some two years ***before*** William Swano first came forward and identified McGee as Maloney's bagman.

E. McGee Paid Bribes to Fix Cases

The government seeks to introduce proof that defendant Robert McGee: (1) fixed the result in a series of cases involving clients Michael Bertucci and William Hall; and (2) impermissibly engaged in an *ex parte* discussion regarding the outcome of *People of the State of Illinois v. Gracia*, with the judge then assigned to the case, Wayne Olson, before the case was resolved.

1. Cases Involving Michael Bertucci and William Hall as Clients of Defendant Robert McGee

Defendant Robert McGee became Bertucci's lawyer after Maloney became a judge. McGee paid money to Judge Maloney and to Chicago Police Department officers in order to dispose of Bertucci-based investigations or cases. McGee also represented other clients Bertucci referred to him in cases pending before Maloney. Maloney and McGee fixed these cases as well.

Some time in 1983 or 1984, after Maloney became a judge, Bertucci was involved in burglarizing a television repair store in order to steal guns. Bertucci learned that a Chicago policeman was going to arrest him. Bertucci was using McGee as his lawyer at that time because McGee was Maloney's former law associate. Bertucci paid McGee approximately $1,000 to pay off the police officer in order to prevent the arrest. Bertucci was never arrested in connection with the crime.

In approximately 1984, the State of Illinois charged Bertucci and another man, William Hall, with several separate acts of battery. At the time, Bertucci and Hall were co-owners of a tavern called "Someplace Else." Bertucci hired McGee to represent each of them in their respective battery cases and told Hall that McGee would fix Hall's case. On McGee's advice, Bertucci ultimately plead guilty on his battery charges and received a probationary term.

Hall's first battery case was assigned to Maloney. McGee remarked to Hall at that time that Maloney was a good judge, that McGee fixed cases with Maloney and

that Hall's troubles were over. Bertucci also told Hall about his own cases that had been fixed by McGee and Maloney.

Hall paid McGee approximately $13,500 in cash for his two pending battery cases. McGee initially advised Hall to plead not guilty in connection with the first case and to take a bench trial before Maloney. Hall did as he was told. During the first case's trial, Maloney called a recess after the prosecution completed its case. Hall saw McGee go through the bailiff's office toward Maloney's chambers. Later during the recess, McGee met Hall in the hallway outside Maloney's courtroom and told Hall that he needed an additional $1,500 that day. Hall told McGee that he had already paid $13,500 and that he had no more money. McGee responded, "you're in big trouble."

When Hall returned to the courtroom, McGee told him that Maloney had consolidated the two battery cases and that he (McGee) had had to agree to a plea bargain. McGee told Hall that he would go to prison unless he changed his plea to guilty. McGee also explained that the deal with Maloney was that in exchange for a guilty plea Maloney would sentence Hall to two years' felony probation. Hall agreed to the arrangement and plead guilty. Maloney then sentenced him to a probationary term.

2. People of the State of Illinois v. Samuel Gracia, No. 80 1-907457

In October 1980, Samuel Gracia was charged with possession of a controlled substance. Defendant Robert McGee entered his appearance shortly after Gracia's arrest. The case was assigned to then-Judge Wayne

Olson.[13] On January 14, 1981, Judge Olson heard a motion to suppress Robert McGee filed on behalf of defendant Gracia.

On that same day, before Olson heard Gracia's motion to suppress, McGee conversed twice with Judge Olson in chambers. Federal agents recorded both of these conversations via a Title III listening device placed in Olson's chambers. In the first conversation, at 11:10 a.m., McGee explained to Judge Olson that his client was charged in a "drop case" and that he (McGee) had four or five witnesses on his side. Judge Olson suggested to McGee that he present a motion to suppress and told McGee to be prepared to put on a corroborating witness. McGee and Judge Olson discussed the state of the law and what was needed to sustain a motion to suppress.

McGee and Judge Olson went on to talk about being careful to talk in safe locations and checking their phone lines for wiretaps. McGee told Judge Olson, "I got, I wanna, I wanna get my lines swept one of these days. But I'm always afraid of the guy that sweeps the lines." Judge Olson then suggested that McGee buy his own line sweeper. On the subject of federal wiretap interceptions, the two corrected noted that [federal government officials per Title III] "gotta notify you" if one is intercepted on a federal wiretap. McGee noted, "I gotta get a straight line through. Maloney has that. One phone, just a straight line in."

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[13] Judge Olson was later convicted as a part of the Greylord investigation into corruption in the Circuit Court of Cook County.

Later that day, at 12:53 p.m., McGee and Judge Olson spoke again about the *Gracia* case. McGee pointed out Gracia in the courtroom and Judge Olson stated, "He seems like a gentleman. He seems like a nice kid." At the end of the conversation, when the motion call was about to begin, Judge Olson told McGee, "make me very proud by the way." During the court proceeding which followed the *Gracia* case was called, McGee put on his motion to suppress and Judge Olson granted the motion and SOL'd the case.

William BRACY, Petitioner-Appellant,

v.

Richard B. GRAMLEY,
Respondent-Appellee.

Roger COLLINS, Petitioner-Appellant,

v.

George C. WELBORN,
Respondent-Appellee.

Nos. 94-3801, 94-3807.

United States Court of Appeals,
Seventh Circuit.

Argued Nov. 29, 1995.

Decided April 12, 1996.

Rehearing and Suggestion
for Rehearing En Banc
Denied June 26, 1996.

Before POSNER, Chief Judge, and CUMMINGS and ROVNER, Circuit Judges.

POSNER, Chief Judge.

William Bracy and Roger Collins were convicted in an Illinois state court in 1981 of three murders committed the previous year. They were sentenced to death and after exhausting their state remedies (see *People v. Collins*, 106 Ill.2d 237, 87 Ill.Dec. 910, 478 N.E.2d 267 (1985); 153 Ill.2d 130, 180 Ill.Dec. 60, 606 N.E.2d 1137 (1992)) sought habeas corpus in federal district court. Judge Hart denied them relief, *United States ex rel. Collins v. Welborn*, 868 F.Supp. 950 (N.D.Ill.1994), and they have appealed, arguing that the state denied them due process of law both at their trial and in the sentencing hearing.

The victims had been taken, bound, from an apartment in a building on the south side of Chicago and had been driven to a viaduct and there shot to death with pistols and a shotgun. The main prosecution witness was Morris Nellum, an accomplice who testified for the government in exchange for being charged only with concealing a felony and promised that the state would recommend a sentence of only three years. (In fact he received only two and a half years – and of probation, not prison.) Nellum testified that Collins had summoned him to the apartment, where he had watched as the victims were led out of the apartment and into a waiting automobile by Bracy, Collins, and a third man, Hooper. (Hooper was tried separately, convicted, and sentenced to death. See *People v. Hooper*, 133 Ill.2d 469, 142 Ill.Dec. 93, 552 N.E.2d 684 (1989), affirming the conviction but vacating the death sentence. On remand, Hooper was again sentenced to death, and this time the Supreme Court of Illinois affirmed. 1996 WL 30547 (Ill. Jan. 25, 1996).)

Collins told Nellum to drive Collins's car, which was parked near the apartment building, to the viaduct. Collins and Hooper then got into the car that contained the three victims and drove away, followed by Bracy in another car. Nellum waited a few minutes and then drove to the viaduct as well. As he approached it, he heard shots. He stopped the car. Collins jumped in and they sped off. Later the two drove to Lake Michigan and Collins threw two pistols into the lake. Nellum, after he was arrested, told the police where the guns had been dumped, and the police found them there. Bullets found in the bodies of the dead men were of the type fired by these guns, although the guns had so deteriorated as a

result of their prolonged immersion in the lake that no positive ballistics identification was possible.

Nellum's testimony was corroborated not only by the finding of the guns but also by testimony from a resident of the apartment building who saw the group leaving on the fatal night. She identified Collins, Nellum, and Hooper in court as resembling three of the men she had seen. She testified that one of the three had been wearing a wide-brimmed hat – and Nellum testified that Collins had indeed been wearing such a hat that night. Further corroboration of Nellum's testimony came from another resident, who testified to having seen Bracy and Collins in the building that night, and from a witness who testified that Bracy had borrowed a pistol from her before the murders and that afterward, when they were in a bar and she asked for the pistol back, he had told her that he had murdered some people with it. One of the pistols found in the lake on the basis of Nellum's tip turned out to be the pistol that she had lent Bracy. This witness also testified that in the same bar she had seen a woman give Bracy a sawed-off shotgun that Bracy had then handed to an employee of the bar, apparently for safekeeping. Bracy and Collins testified on their own behalf, denying any participation in the murders, and presented a parade of alibi witnesses of dubious credibility.

The evidence of guilt presented at the trial was compelling, and while there is a question, as we shall see, about the veracity of some of Nellum's testimony, even if that question were resolved in the defendants' favor we would have no basis for doubting the guilt of either Bracy or Collins. Hooper was tried separately because his confession implicated them and the confession is further

evidence, though of course not evidence presented to the jury in our case, that they really did, along with Hooper, commit the murders. Because this evidence was inadmissible it cannot be used to show that the errors of which Bracy and Collins complain are unlikely to have affected the verdict. Cf. *Sullivan v. Louisiana*, 508 U.S. 275, 278-79, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); *United States v. Ross*, 77 F.3d 1525 (7th Cir. 1996). But the evidence that *was* admissible shows that they were guilty and this is important because, with a few exceptions, a person convicted in a state court may not obtain an order for a new trial from a federal court on the basis of constitutional errors committed at the trial unless the errors resulted in actual prejudice, or, equivalently, unless they substantially influenced the verdict, *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S.Ct. 1710, 1722, 123 L.Ed.2d 353 (1993), or, in other words, were likely to have made the difference between conviction and acquittal.

The only error that the petitioners argue requires a new trial regardless of whether it was prejudicial is that the judge who presided at their trial was later convicted of having accepted bribes from criminal defendants in several other cases (including murder cases) around the time when Bracy and Collins were tried. *United States v. Maloney*, 71 F.3d 645, 650-52 (7th Cir.1995). There is no suggestion that Bracy and Collins bribed or offered to bribe him. The argument rather is that Judge Maloney came down hard on criminal defendants in cases in which he was *not* bribed, to avoid suspicion that he was on the take, to cancel any bad impression that his acquittals might make on the voters – maybe even to make defendants desperate to bribe him, fearing he would punish

them with adverse rulings if they did not. There is no evidence, but only conjecture, that Maloney actually did lean over backwards in favor of the prosecution in this or any other case in which he was not bribed; did, that is, rule against the defense only because he was taking bribes in other cases. Collins argues that evidence is unnecessary, and Bracy that if it is necessary their request for discovery should have been granted.

A judge could be biased and yet the bias not affect the outcome of the case. But judicial bias is one of those "structural defects in the constitution of the trial mechanism," as distinct from mere "trial errors," that automatically entitle a petitioner for habeas corpus to a new trial. *Brecht v. Abrahamson, supra*, 507 U.S. at 629, 113 S.Ct. at 1717; see *Sullivan v. Louisiana, supra*, 508 U.S. at 278-79, 113 S.Ct. at 2081; *Tumey v. Ohio*, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927); *Tyson v. Trigg*, 50 F.3d 436, 442 (7th Cir.1995). What is bias? Defined broadly enough, it is a synonym for predisposition, and no one supposes that judges are blank slates. There are prosecution-minded judges, and defense-minded judges, and both sorts have predispositions – biases that place an added burden on one side or the other of the cases that come before them. Yet no one supposes that the existence of such biases justifies reversal in cases where no harmful errors are committed. The category of judicial bias is ordinarily limited to those predispositions, real or strongly presumed, that arise from some connection pecuniary or otherwise between the judge and one or more of the participants in the litigation. Whether the present case even fits that mold may be doubted, but, in any event, for bias to be an automatic ground for the

reversal of a criminal conviction the defendant must show either the actuality, rather than just the appearance, of judicial bias, "or a possible temptation so severe that we might presume an actual, substantial incentive to be biased." *Del Vecchio v. Illinois Dept. of Corrections*, 31 F.3d 1363, 1380 (7th Cir.1994) (en banc); see *Branion v. Gramly*, 855 F.2d 1256, 1268 (7th Cir.1988); *Margoles v. Johns*, 660 F.2d 291, 296-97 (7th Cir.1981) (per curiam). In rejecting reversal on the basis of a mere appearance of partiality or bias *Del Vecchio* relied in part on a presumption, obviously inapplicable here, that judicial officers perform their duties faithfully. 31 F.3d at 1372-73. But that was not the core of the decision. The fundamental reason that an appearance of impropriety is not alone enough to require a new trial is that it provides only a weak basis for supposing the original trial an unreliable test of the issues presented for decision in it. The fact that Maloney had an incentive to favor the prosecution in cases in which he was not bribed does not mean that he did favor the prosecution in such cases more than he would have done anyway.

Sometimes – this is the second half of the test that we quoted from *Del Vecchio* – the incentive to engage in biased behavior is so great that inquiry into the actuality of that behavior is pretermitted. *Id.* at 1372-73; see also *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955). This rule recognizes both the practical impediments to obtaining reliable evidence of a judge's motives and the difficulty of overcoming public skepticism of judicial motives when the temptation to impropriety is great. But the automatic rule must be interpreted circumspectly, with due recognition of the cost to society of

overturning the convictions of the guilty in order to vindicate an abstract interest in procedural fairness. The fact that the people for obvious practical reasons do not have judicially enforceable rights to the protection of the criminal laws (though they do have judicially enforceable rights against discriminatory withdrawal of that protection) does not warrant a court in disregarding their interests when the court is formulating rules of constitutional law. Accepting Collins's contention would require a new trial in *every* case, jury and nonjury, capital and noncapital, in which a judge later found to be corrupt had presided and the defendant had been convicted, even though the judge had not been bribed by the prosecutor. (If the *defendant* had bribed the judge and been acquitted, the double jeopardy clause probably would not bar reprosecution, *Benard v. State*, 481 S.W.2d 427, 430 (Tex.Crim.App.1972) – the defendant would never have been in any actual "jeopardy." The issue has not been definitively resolved, however, David S. Rudstein, "Double Jeopardy and the Fraudulently-Obtained Acquittal," 60 *Mo. L. Rev.* 607 (1995), and obviously need not be in order to decide the present case.) *Any* judge who is on the take will have an incentive to adopt Judge Maloney's alleged strategy and thus always do his best (or worst) to see to it that a defendant who does not bribe him is convicted. A principled acceptance of Collins's argument would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes. The fact that this is a death case magnifies the appearance of

impropriety but is irrelevant to an issue that goes to the propriety of conviction rather than merely to that of the sentence.

The assumption underlying Collins's argument is that a judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes. The assumption is plausible but the consequences are unacceptable. If we were to inquire into the motives that lead some judges to favor the prosecution, we might be led, and quickly too, to the radical but not absurd conclusion that *any* system of elected judges is inherently unfair because it contaminates judicial motives with base political calculations that frequently include a desire to be seen as "tough" on crime. See generally Steven P. Croley, "The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law," 62 *U.Chi.L.Rev.* 689, 726-29 (1995).

No precedent has been cited to us for invalidating a judge's rulings in a case in which he is known not to have taken a bribe, simply because he took bribes in other cases. *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), disapproved the use of novel grounds to grant relief on an application for habeas corpus. The state does not cite *Teague*, but we are free to apply it anyway. *Caspari v. Bohlen*, ___ U.S. ___, ___, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994); *Eaglin v. Welborn*, 57 F.3d 496, 499 (7th Cir.1995) (en banc). The argument for automatic reversal is not compelling even if its lack of a secure grounding in prior cases and its alarming potential irradiation of future cases are ignored. While a corrupt judge might decide to tilt sharply to the prosecution in cases in which he was not taking bribes – to right the balance as it

were – it is equally possible that he would fear that by doing so he would create a pattern of inconsistent rulings that would lead people to suspect he was on the take. When a severely prosecutorial judge sides unexpectedly with the defense in some arbitrary subset of cases, corruption is a possible explanation. If instead the judge maintains a generally pro-defendant stance, he may jeopardize his chances for reelection (Maloney was appointed to a vacancy, but he had to stand for election, and did so, when the term of his original appointment expired), and the number and size of the bribes he receives may be diminished because defendants will be less fearful of the consequences of not bribing him. But he may also still any suspicions that he is on the take, because his rulings in favor of defendants in cases in which he is bribed will not stand out.

This was a jury trial rather than a bench trial, moreover, and acquittals in jury trials are more likely to be blamed on the jury than on the judge. When as sometimes happens a judge campaigning for election is accused of never having convicted a rapist or sentenced a murderer to death, cf. *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224, 226 (7th Cir.1993), the reference is to bench trials, where the decision to convict or acquit is the judge's, and to sentences handed down by judges rather than, as in capital cases in Illinois, by juries unless the defendant waives a jury. It is in cases tried to the bench that the judge as decision-maker must shoulder full responsibility for the decision. When he merely presides, his responsibility for the outcome is less. We do not understand Bracy and Collins to be arguing that Maloney was more likely to sentence them to death, as distinct

from being more likely to rule against them during the trial, as a consequence of his taking bribes in other cases.

We are, it is true, speculating about the likely impact of Maloney's corruption on the rulings that he made at the trial of these petitioners. We also acknowledge the possibility that the cumulative effect of those rulings was greater than we imagine. *Tyson v. Trigg, supra*, 50 F.3d at 439. But the defendants are speculating too. Some of Maloney's rulings went against the defendants and obviously those are the ones they complain about, but they have not shown that there were so few rulings in their favor that the judge *must* have been biased in favor of the government. To show this would not have required an investigation, but merely a review of the transcript of the trial. It is unlikely that the specific rulings of which the defendants complain either were the product of a corrupt backward bending in the government's favor or influenced the jury's verdict. The Supreme Court of Illinois did not find any errors in the rulings.

The argument that a judge who accepts bribes in some cases is corrupt in all is not a sufficiently compelling empirical proposition to persuade us to treat this case as if Judge Maloney had taken a bribe from the government to convict. If the argument is rejected, ours is a case in which there is merely an appearance of impropriety in the judge's presiding, and an appearance of impropriety does not constitute a denial of due process. Appearance of impropriety there was. We know this because if a judge were under indictment for accepting bribes he would not be permitted to hear any cases. Ill. S.Ct. R. 56(a)(1). But without more a defendant's conviction cannot be set aside.

The petitioners also seek discovery, so that they can try to find out whether there was actual bias by Judge Maloney at their trial. Discovery is available in a habeas corpus proceeding not as a matter of course as in an ordinary civil litigation but only if the district judge finds "good cause" to order discovery. Rule 6(a) of the Rules Governing Section 2254 Cases in the United States District Courts; *East v. Scott*, 55 F.3d 996, 1001 (5th Cir.1995). The petitioners want to study a large sample of Judge Maloney's cases to see whether a pattern of favoring the prosecution in cases in which he was not bribed emerges, to depose "some of those persons and witnesses who were most intimately associated with Judge Maloney who may be able to provide material information on his behavior in cases where he didn't get bribes," and to get hold of any evidence that the federal government might have obtained in its prosecution of Maloney that he really did lean over backwards in favor of the government in cases in which he was not bribed – perhaps in this very case. The first proposal would not require formal discovery at all, since Maloney's cases are a matter of public record. The third too; in the first instance at any rate, all it would require is a perusal of the transcript of Maloney's trial. It is true that a part of the trial record was sealed, but it was unsealed in August of 1994, so that the petitioners' lawyers have had a year and a half to look for clues in that record. The second proposal is for a fishing expedition. Even if the expedition discovered that Maloney did lean over backwards in favor of the prosecution in cases in which he was not bribed, in order to conceal his taking of bribes in other cases, it would not show that he followed the practice in this case. This may be a case

in which *any* judge would have ruled in favor of the government in the instances of which the defendants complain.

A party to an ordinary civil suit need not demonstrate good cause in order to be permitted to conduct discovery. A petitioner for habeas corpus must, because collateral attack on a criminal judgment that has become final is an extraordinary remedy. Without the aid of formal discovery the petitioners' able counsel could have (and perhaps have) studied the pattern of Judge Maloney's rulings in cases in which he did and cases in which he did not take bribes, could have (and perhaps have) inventoried his rulings in the present case to see whether they consistently favored the prosecution, and could have (and perhaps have) studied the record of Maloney's prosecution by the United States for clues to their theory of bias. If none of these public sources of information has yielded any evidence of bias in our case – and none has – the probability is slight that a program of depositions aimed at crooks and their accomplices and likely to be derailed in any event by real and feigned lapses of memory will yield such evidence.

We do not make light of judicial corruption. It has tainted the judicial system of Illinois, caused unjust acquittals, jeopardized convictions, tarnished the legal profession, and raised profound doubts not only about the state's method of selecting judges but also about the entire political culture of the state. But in the circumstances of this case, corruption is not a constitutional ground for vacating the petitioners' convictions.

The petitioners raise another issue of bias, this in the context of a claim of ineffective assistance of counsel. One of the jurors was the wife of an Illinois state judge who had once sentenced Bracy to prison for armed robbery. The defendants' lawyer was aware of this but did not object to her being selected for the jury. Toward the end of the trial, however, the lawyer revealed to the jury that Judge Downing, the juror's husband (though not identified as such to the jury), had once given Bracy the most severe sentence that he had ever received prior to this case. The petitioners argue that, thus reminded that her husband had dealt harshly with Bracy on a prior occasion, Mrs. Downing was bound to be prejudiced against Bracy and perhaps therefore his codefendant as well. This is too thin a speculation to justify a new trial on the ground of ineffective assistance of counsel and we are not persuaded by the proposal that in lieu of ordering a new trial we order the district court to conduct an evidentiary hearing at which Mrs. Downing would be questioned about what she was thinking when she was a member of the jury fourteen years ago. The defendants were content to have as a juror the wife of the judge *who they knew had sentenced Bracy to a long prison term*, and the decision to accept her is not and could not plausibly be claimed to be ineffective assistance. Only the lawyer's slip of the tongue that revealed this fact to her could be thought ineffective assistance. But if so, the likely prejudice was too slight to warrant a new trial, or an evidentiary hearing unlikely to be any more fruitful than discovery concerning Judge Maloney.

Another alleged irregularity at trial is the judge's failure to strike remarks made by the prosecutors in

closing argument. The worst remark to which an objection has been preserved was: "and if you think I would jeopardize my license, my family, my children, my future to put [a peripheral witness named Dorfman] on in a case and make him lie. . . . " This is claimed to be "vouching" for the truth of the witness's testimony, which prosecutors are not supposed to do, because it crosses the line from advocacy to testimony. Defense counsel had accused the prosecutor of wanting to convict Collins so badly that he "made a guy [Dorfman] come in here and tell you something that he knows is not in that report." In other words, defense counsel was accusing the prosecutor of having made a witness tell a lie. The prosecutor denied this in the passage that we have quoted. This was not vouching for the truth of the witness's testimony. It was denying that the prosecutor had made the witness lie. And anyway vouching is not a violation of any specific constitutional right but at most an irregularity that if shown in a particular case to have been likely to have led to the conviction of an innocent man might be held to be a denial of due process of law in that case. *Rodriguez v. Peters*, 63 F.3d 546, 558 (7th Cir.1995); *Kappos v. Hanks*, 54 F.3d 365, 367 (7th Cir.1995). No such inference is possible here.

The next question is the standard for granting an evidentiary hearing when, long after the conviction of a criminal defendant, a prosecution witness steps forward and recants a part of his testimony. Many years after the trial of Bracy and Collins, a private investigator retained by the defendants' counsel talked to Morris Nellum. Later Nellum was interviewed by Bracy's lawyer and a transcript was made of that interview. Nellum did not

recant his testimony that Bracy and Collins had committed the murders. He merely tried to exonerate the third murderer, Hooper. But in explaining how he had come to testify against Hooper he made lurid accusations that the police had beaten Bracy and him (Nellum) and threatened him with a sledgehammer and that the prosecutors had told him to lie about such details as when he had first told the police where the pistols used in the murders had been pitched. The jury had been told that Nellum had at first denied knowing the whereabouts of the gun but not that the prosecutors had told him to lie about that denial.

Nellum later repeated a part of his recantation in a deposition that was interrupted when an Illinois prosecutor who had talked to him after the interview with defense counsel, and an Arizona prosecutor, reminded Nellum that he had said he only wanted to testify in front of a judge. In seeking an evidentiary hearing the defendants' lawyers rely primarily on the transcript of the interview rather than on the interrupted deposition. They argue that it creates enough suspicion that the prosecutors knowingly used perjured testimony at the trial to require an evidentiary hearing to get to the bottom of Nellum's recantation.

None of the alleged lies concerns a matter vital to the government's case. Nellum did not deny that he was present when the victims were removed from the apartment, that he drove to the viaduct to pick up Collins, and that he saw Collins toss the pistols into Lake Michigan. Yet if the jury had thought that the police had beaten Nellum and that the prosecutors had coerced him to lie, albeit about details of the offense rather than about the involvement of the defendants, his credibility, already

compromised because he was testifying in exchange for the promise of a sentence extraordinarily lenient considering that he had been an accomplice in three murders, might have been so far impaired that the jury would have disbelieved the core as well as the periphery of his testimony.

Given this possibility, we must consider what showing based on newly discovered evidence that a constitutional violation may have been committed at trial (here, the knowing use of perjured evidence by the prosecution) is necessary before a hearing to determine the truthfulness of the evidence is required. The state argues only weakly that the petitioners should have obtained the recantation sooner, in which event it would not be newly discovered evidence in the relevant sense. *Dever v. Kansas State Penitentiary*, 36 F.3d 1531, 1536 (10th Cir.1994). So the request for an evidentiary hearing is not barred by a want of diligence, and furthermore it cannot be a condition of the grant of such a hearing that the movant already have in his possession all the evidence that he seeks to develop in the hearing. But equally it cannot be enough that the petitioner has found *some* new evidence. To reopen a criminal proceeding many years after the defendant was convicted and his conviction affirmed (which in this case occurred more than ten years ago) is an extraordinary interference with the finality of the criminal process and requires a demonstration that a hearing would probably yield evidence that would require a new trial at which the petitioner would have a substantial chance of acquittal. In view of the passage of time since, and the disordered social milieu in which, the petitioners committed these murders, it is doubtful

whether they could be retried with good prospects for an accurate verdict, even though their guilt of multiple murders committed in cold blood is not in doubt. They cannot be blamed for the fact that it has taken fifteen years for their challenge to their convictions to come to this court; so far as we can tell, they have not abused the postconviction process. But one consequence of the extraordinary delays that are tolerated in capital cases in order to minimize the risk of mistaken execution is that an order for a new trial issued toward the end of the normal postconviction process may have the practical effect of an acquittal. This consideration makes judges hesitate to order new trials on the basis of newly discovered evidence unlikely to be reliable or, even if believed, to undermine confidence in the verdict.

We are mindful that in *Townsend v. Sain*, 372 U.S. 293, 312, 83 S.Ct. 745, 756, 9 L.Ed.2d 770 (1963), the Supreme Court stated that "where the facts are in dispute, the federal court in habeas corpus must hold an evidentiary hearing" unless the petitioner received a full and fair hearing in state court. This passage from the *Townsend* opinion continues to be quoted approvingly. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 399, 113 S.Ct. 853, 860, 122 L.Ed.2d 203 (1993). But it cannot be taken literally, since we know that the district court "may employ a variety of measures in an effort to avoid the need for an evidentiary hearing" on disputed facts, *Blackledge v. Allison*, 431 U.S. 63, 81, 97 S.Ct. 1621, 1633, 52 L.Ed.2d 136 (1977), including a direction to expand the record to include evidentiary materials that may resolve the factual dispute without a hearing. *Id.* at 82, 97 S.Ct. at 1633; Rule 7 of the Rules

Governing Section 2254 Cases in the United States District Courts.

Likewise, not any old allegation of newly discovered evidence will trigger an evidentiary hearing; the allegation must be "substantial." *Townsend v. Sain, supra*, 372 U.S. at 313, 83 S.Ct. at 757. That is common sense. Had Judge Hart in his order of August 24, 1994, granted rather than denied the motion for an evidentiary hearing, and the hearing been held later that year, the witnesses, primarily Nellum and the prosecutors and police involved in the investigation and prosecution of the murder cases against Bracy, Collins, and Hooper, would have been testifying about events that had occurred thirteen to fourteen years earlier. So long an interval between the events and the testimony about the events would cast a pall of doubt over the reliability of the testimony. Ours is not the typical situation in which an evidentiary hearing is granted in a postconviction proceeding. Not only is the interval typically shorter, as in *Daniels v. United States*, 54 F.3d 290 (7th Cir.1995), and *Barkauskas v. Lane*, 878 F.2d 1031, 1034 (7th Cir.1989), but when it is as long as it would be here this is usually because the state failed to give the petitioner a full and fair hearing, and the state must not be rewarded for its own denials of due process. When the request for a federal evidentiary hearing is based on evidence gathered long after the event – too late to be presented to the state courts, which cannot be faulted for having failed to provide the petitioner with an evidentiary hearing – the federal court is entitled to insist, as a precondition to granting a hearing, that the petitioner demonstrate that he have a "colorable" claim, meaning by this not that it be nonfrivolous on its face (the

usual meaning of "colorable") but that there be some reason to think it valid. *Siripongs v. Calderon*, 35 F.3d 1308, 1314 (9th Cir.1994).

Even if Nellum testified under oath to all that he had told Bracy's lawyer and even if his testimony were believed over that of prosecutors and police almost certain to testify contrary to Nellum, thus establishing that the prosecution made knowing use of perjured testimony, a new trial would not be warranted. The knowing use of perjured testimony by the prosecution, although a very serious infringement of the constitutional rights of a criminal defendant, is not an automatic basis for a new trial. There must be a reasonable likelihood that the violation affected the verdict. *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 2397, 49 L.Ed.2d 342 (1976); *Giglio v. United States*, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *United States v. Boyd*, 55 F.3d 239, 243 (7th Cir.1995). The evidence of Bracy's and Collins's guilt was very powerful and evidence brought out at the evidentiary hearing which if repeated at a new trial would merely cast doubt on Nellum's credibility would be unlikely to sway a jury. We are imagining a new trial at which all the evidence is the same except that Nellum changes some of the details of his earlier testimony, and, when the changes are thrown in his face, makes lurid accusations against the police and the prosecutors. The core of Nellum's testimony would be unaffected and would be richly corroborated by the testimony of the other witnesses whose evidence we summarized at the beginning of this opinion (assuming those witnesses can be found and persuaded to testify or the transcript of their original testimony is admitted at the second trial),

and by the guns. Of course we cannot be certain that once Nellum started down the recantation path he would go no further than he has done to date. Having completed his bargained for sentence long ago he has no incentive to cooperate with the prosecution. But the more sweeping his recantation, the less credible it is likely to be.

Prosecutors frequently rely heavily on the testimony of members of the criminal class, such as Nellum, who did not "go straight" after completion of his light sentence for his role in the murders. They have no choice. These witnesses from the criminal demi-monde are not only unreliable witnesses, as the defendants' counsel emphasized to the jury in asking them to disbelieve Nellum's testimony; they are unreliable *people*. We would be imperiling the punishment of dangerous criminals if we established a precedent that would invite the lawyers for convicted defendants (especially in capital cases, not only because of the stakes involved but also because few prisoners other than those under sentence of death are represented in postconviction proceedings) to pester these witnesses to recant many years after they had testified. We do not suggest that the lawyers would act unethically. In the American system of justice the zealous representation of a client is a duty, not an ethical lapse. And in some cases the recantations would be genuine and material and if so they would be a proper basis for ordering a new trial despite the passage of time. But we are given no reason to suppose that Nellum's recantations are either genuine or material. His original testimony was amply corroborated and his recantation preserved the

core of the original testimony intact. And while the interview with Bracy's lawyer occurred in 1992 and the abortive deposition the following year, in the more than two years that have elapsed since the deposition the defendants' current lawyers, whose energy and ability cannot be doubted, have failed to obtain any corroboration for Nellum's recantation.

We cannot of course determine the credibility of Nellum's recantation; we can only express our suspicions. These are germane, however, because an evidentiary hearing need not be granted on the basis of newly discovered evidence presented many years after the defendant's conviction became final unless there is a good reason to expect the hearing to result in an order for a new trial. We cannot find this proposition clearly articulated in any case, but it seems to us consistent with the results in the cases and sound as a matter of first principles. The circumstances of Nellum's recantation, the strength of the original evidence, and the fact that the core of his testimony was not recanted persuade us that the request for an evidentiary hearing was properly denied.

We turn to the defendants' challenge to the sentencing hearing. They complain that their lawyers were not given enough time to obtain evidence of mitigating circumstances for submission to the jury at that hearing. They asked for a continuance immediately after the jury convicted their clients but it was denied. It was properly denied. In Illinois the jury that determines the defendant's guilt in a capital case also determines whether he is to be sentenced to death, unless as in this case the defendant waives his right to be sentenced by the jury. Since it is the same jury, the sentencing hearing perforce

follows immediately upon the trial, as it also does when the jury is waived. Defense lawyers know all this and therefore if they wish to gather evidence of mitigating circumstances they must do so before the trial ends, because they will have no time to do so after the trial ends. But in this case the defendants' lawyers dropped the ball and the defendants argue in the alternative that by doing so the lawyers failed to provide competent assistance of counsel at the sentencing hearing.

Perhaps so, but we need not decide this; for there was no prejudice, and without proof of prejudice a claim of ineffective assistance of counsel cannot succeed. The defendants' current lawyers have turned up no mitigating circumstances that might have been put before the jury with a fair chance of success. It is true that one of the *aggravating* circumstances, though limited to Bracy, is that shortly after participating in the triple murder in Chicago he participated in a double murder in Arizona. He had not yet been tried for those murders but the woman who was the wife and daughter of the murder victims and the state's main witness was brought to Chicago to testify in the sentencing hearing that Bracy was indeed one of the Arizona murderers. The defendants argue that their lawyers failed to present alibi evidence that might have persuaded the jury that Bracy had not committed those murders. We have little patience with this argument. Bracy was later convicted and sentenced to death for the Arizona murders, and the burden of proof that the state bore in convicting him was of course higher than it bore in the sentencing hearing, for the existence of an aggravating circumstance need only be proved by a preponderance of the evidence, provided that at least one such

circumstance has been proved beyond a reasonable doubt, thus making the defendant eligible for the death sentence. 720 ILCS 5-9-1 (f); *Free v. Peters*, 12 F.3d 700, 703 (7th Cir.1993); *People v. Ramey*, 152 Ill.2d 41, 178 Ill.Dec. 19, 35-36, 604 N.E.2d 275, 291-92 (1992). So if all the evidence that had been before the Arizona jury had been presented to the jury in Chicago, the Chicago jury surely would have found that Bracy had committed the Arizona murders. Not all that evidence was presented, so maybe the jury would have been swayed by alibi evidence that we now know is false. But no principle of justice authorizes throwing out a sentence on the ground that the sentence might have been different had the defendant been allowed to present false testimony. *Lockhart v. Fretwell*, 506 U.S. 364, 369-71, 113 S.Ct. 838, 842-43, 122 L.Ed.2d 180 (1993); *Nix v. Whiteside*, 475 U.S. 157, 175-76, 106 S.Ct. 988, 998-99, 89 L.Ed.2d 123 (1986).

Bracy objects to some remarks by the prosecutor at the closing argument at the sentencing hearing. The worst was, "Some of us went to Viet Nam and had to kill for this country, and I will be damned if anybody is going to tell me that what we did in Viet Nam or in any other war was a violation of the Fifth Commandment of the Bible." This was a response to defense counsel's argument that to sentence the defendants to death would violate the Ten Commandments, one of which of course is, "Thou shalt not kill." The prosecutor was pointing out, with unnecessary but not we think fatally prejudicial emphasis, that there is such a thing as justified homicide and that the execution of a duly convicted and sentenced murderer is, plausibly, an illustration of it.

Collins objects to the exclusion of a prospective juror on the basis of his acknowledging in response to a question by the judge that he would "probably" not consider imposing the death penalty. The defendants' lawyer did not object to excusing this prospective juror for cause. We do not think this was error, and certainly not error of constitutional proportions, given the absence of an objection. *Wainwright v. Witt*, 469 U.S. 412, 424-26, 429, 105 S.Ct. 844, 852-54, 855, 83 L.Ed.2d 841 (1985).

The petitioners present other issues, but they either have too little merit to warrant discussion or they are foreclosed by previous decisions of this court that we are not given any reason to reexamine. We have considered the possibility that the cumulative effect of the various irregularities alleged tips the balance in favor of a new trial or a new sentencing hearing but have concluded that it does not. We regret that Judge Maloney presided over the petitioners' trial but we do not think that the Constitution relieves them from the judgments that the Illinois courts have rendered.

AFFIRMED.

ILANA DIAMOND ROVNER, Circuit Judge, dissenting.

No right is more fundamental to the notion of a fair trial than the right to an impartial judge. *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, 1780, 29 L.Ed.2d 423 (1971) (per curiam); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955); *see also Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); *Tumey v. Ohio*, 273 U.S.

510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). "The truth pronounced by Justinian more than a thousand years ago, that '[i]mpartiality is the life of justice,' is just as valid today as it was then." *United States v. Brown*, 539 F.2d 467, 469 (5th Cir.1976) (per curiam). The constitutions of our nation and of our states, the rules of evidence and of procedure, and 200 years of case law promise a full panoply of rights to the accused. But ultimately the guarantee of these rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.

The State of Illinois placed the fate of William Bracy and Roger Collins in the hands of a racketeer. Thomas Maloney is presently serving a prison term of nearly sixteen years for racketeering, conspiracy to commit racketeering, extortion under color of official right, and obstruction of justice. A jury determined that Maloney had accepted $10,000 in 1986 to acquit two El Rukn leaders of a double murder, an undetermined portion of a $100,000 payment in 1981 to acquit three New York gang members of murdering a rival in Chicago's Chinatown, and between $4,000 and $5,000 in 1982 to convict another individual of voluntary manslaughter rather than felony murder. These were but three of the bribes that witnesses attributed to Maloney at his trial. *See United States v. Maloney*, 71 F.3d 645 (7th Cir.1995); Matt O'Connor, *Judge Maloney found guilty in corruption case*, CHICAGO TRIBUNE, April 17, 1993, News, at 1. At sentencing, Judge Leinenweber also found that Maloney had, while still a practicing lawyer, cooperated in procuring the notorious acquittal of reputed mob hitman Harry Aleman by Judge Frank Wilson in 1977. Mob enforcer Michael Bertucci testified that Maloney had helped him to evade a series of

criminal charges by bribing judges as far back as the late 1960s, although Judge Leinenweber discounted this testimony. It would seem, in any event, that by the time Maloney ascended to the bench in 1977, he was well groomed in the art of judicial corruption, an art that he would practice at least until 1986, when he correctly perceived that he was under the watchful eye of the FBI and returned the $10,000 bribe he had accepted in the El Rukn prosecution.

Bracy and Collins were tried before Maloney in 1981, in the midst of Maloney's bribe taking. Maloney did not solicit a bribe from either defendant, nor did the defendants offer him one. Nor did the prosecution bribe Maloney. But given the abundant proof (and a federal jury's finding) that justice was for sale in Maloney's courtroom, we are compelled to consider whether Maloney may be deemed the impartial judge to which due process entitled these defendants.

1.

The petitioners argue that in cases that were not fixed, Maloney had an incentive to be particularly tough on defendants, in order to divert suspicion that might otherwise be aroused by the acquittals he was paid to render and to strengthen the incentive for defendants to bribe him. Without conceding that further evidence of Maloney's partiality was required to establish Maloney's constitutional inadequacy as a judge, the petitioners sought leave from the district court to engage in discovery, with the aim of establishing a pattern of corruption that affected Maloney's conduct in not only those cases in

which he had accepted a bribe but also those in which he had not. Judge Hart denied their request, deeming what the petitioners sought to prove to be a matter of speculation and, in any event, insufficient to establish a constitutional deprivation. *United States ex rel. Collins v. Welborn*, 868 F.Supp. 950, 991 (N.D.Ill.1994). Like my colleagues in the majority, the district judge concluded that the most the circumstances permitted Bracy and Collins to argue was the mere possibility of bias, which *Del Vecchio v. Illinois Dep't of Corrections*, 31 F.3d 1363 (7th Cir.1994) (en banc), *cert. denied*, ___ U.S. ___, 115 S.Ct. 1404, 131 L.Ed.2d 290 (1995), indicates is not enough to establish a deprivation of due process. 868 F.Supp. at 991.

In fact, the notion that Maloney was deliberately tough on defendants who did not bribe him finds support in the testimony presented at Maloney's trial. Defense attorney William Swano arranged several of the bribes for which Maloney was prosecuted and was a key government witness against him. In 1985, Swano represented James Davis, whom the state had charged with armed robbery. The case was assigned to Maloney for trial. By this time, Swano had already bribed Maloney on a number of occasions. But after investigating the prosecution's case against Davis, Swano concluded that it would be unnecessary to bribe Maloney in order to obtain an acquittal in this case: three witnesses to the robbery knew the two perpetrators and said that Davis was not one of them; Davis had an alibi; and the victim of the crime, who had initially identified Davis as one of the perpetrators, had confessed uncertainty about the identification. Swano was confident that "[t]he case was a not guilty in any courtroom in the building." *United States v. Thomas J.*

Maloney and Robert McGee, No. 91 CR 477, 1994 WL 96673 Tr. 2528 (N.D.Ill. March 24, 1993). To Swano's surprise, however, Maloney convicted his client after a bench trial. Swano took this as a lesson that "to practice in front of Judge Maloney . . . we had to pay." Tr. 2530. That Swano had correctly interpreted this conviction as a lesson was arguably confirmed by Maloney's bagman, Robert McGee. Swano met with McGee soon after Davis was convicted to discuss a fix in the double murder trial of the two El Rukns. Swano had persuaded his client that bribing Maloney was the prudent course, explaining that he had only lost one case before Maloney, "and that was the one that we didn't work," *i.e.*, fix. Tr. 2544; *see also* Tr. 2559. In arranging the meeting with McGee, Swano had told him that he wanted to discuss "a hot case in front of Judge Maloney". Tr. 2567. McGee said that he would first have to obtain Maloney's permission. Tr. 2567. When Swano and McGee subsequently met at Le Bourdeux, a local watering hole, McGee told Swano that he had gotten the okay from Maloney to speak about the matter. Swano recalled: "He told me that the judge had said we could talk, especially in view of the way the judge had screwed me on the last case," which Swano understood to be a reference to the Davis case. Tr. 2567-68. Swano voiced agreement with the assessment "that the judge had screwed me on the case and had screwed my client." Tr. 2568. He and McGee then got down to details about the El Rukn fix. That bribe was one of four that the jury later found Maloney guilty of accepting.

One may infer from Swano's testimony that Maloney saw the Davis prosecution, in which no bribe was tendered, as an opportunity to teach Swano a lesson that

would ensure bribes in future cases. That, at least, was the moral of the story for Swano. If Swano was right (a matter for the factfinder, not us, to determine), then it would seem that Maloney's approach to case fixing was indeed the global view that Bracy and Collins posit: fixed cases were a source of illicit profit, whereas unfixed cases were an opportunity, as Bracy puts it, to "advertise" in the defense bar (Bracy Reply at 1) while at the same time protecting his franchise by currying favor with law and order minded voters and avoiding the ire of the law enforcement community. Like my colleagues, I think that the petitioners face an exceedingly difficult task in attempting to unearth evidence that will lend further support to their theory (*see ante* at 691), but Swano's testimony suggests that the search may not be futile.

At bottom, my colleagues believe that Bracy and Collins are not entitled to discovery because the most they can hope to prove is that Maloney made it a practice to lean over backwards in favor of the prosecution in cases in which he was not bribed; without proof that he followed that practice in *this* case, they reason, Bracy and Collins have no claim. *Ante* at 691. But when the trial judge is tainted by a pervasive conflict of interest – in other words, one not limited to a particular litigant or type of case-evidence that the taint had a discernible effect on a given case is unnecessary. Here the showing that my colleagues require would be all but impossible to make, absent either an extraordinary admission from Maloney, which is not forthcoming (Maloney continues to proclaim his innocence) or the kind of over-the-top courtroom behavior that makes a judge's partiality plain (*see, e.g., United States v. Dellinger*, 472 F.2d 340, 386-88 (7th

Cir.1972), *cert. denied*, 410 U.S. 970, 93 S.Ct. 1443, 35 L.Ed.2d 706 (1973)), a rare phenomenon not evident from the record here. In any event, the Supreme Court has expressly rejected the idea that such proof is mandated, finding that it "requires too much and protects too little." *Ward*, 409 U.S. at 61, 93 S.Ct. at 83; *see also Aetna*, 475 U.S. at 830-31, 106 S.Ct. at 1590 (Brennan, J., concurring); *id.* at 831-33, 106 S.Ct. at 1590-91 (Blackmun, J., concurring). To establish a deprivation of due process, the petitioners need only show that the circumstances "would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear, and true between the state and the accused." *Tumey*, 273 U.S. at 532, 47 S.Ct. at 444; *accord Aetna*, 475 U.S. at 822, 106 S.Ct. at 1585; *Ward*, 409 U.S. at 60, 93 S.Ct. at 83; *Del Vecchio*, 31 F.3d at 1372, 1373. Proof that Maloney was motivated by virtue of his bribe taking to favor the prosecution and disfavor the defense in unfixed cases would permit, if not compel, the inference that Maloney's adverse rulings against Bracy and Collins were animated by a pernicious intent on Maloney's part (*see* Fed.R.Evid. 404(b)) and would more than satisfy the standard the Supreme Court has enunciated.

Habeas Rule 6(a) requires only that the petitioner demonstrate "good cause" to engage in discovery, and Bracy and Collins have certainly done so here. In view of the jury's verdict against Maloney, it is undisputed that he was accepting bribes at the very time that Bracy and Collins came to trial. Although there is no suggestion that money oiled the wheels of justice in this case, my colleagues concede the plausibility of the notion that "a

judge's corruption is likely to permeate his judicial conduct rather than be encapsulated in the particular cases in which he takes bribes." *Ante* at 689. Putting aside for the moment contamination of the judge's philosophy, it seems to me likely that any judge who accepts bribes and wishes to remain on the bench will think in strategic terms about his other cases. As Chief Judge Posner points out, one might wonder whether it would really have been in Maloney's interest to assume a pro-prosecution mantle in unfixed cases, lest the occasional acquittal purchased from him look out of character. *Ante* at 689-90. But the time for such deliberation is after an evidentiary hearing on the matter, when the petitioners have had the opportunity to find and present whatever evidence there may be to establish any practice Maloney may have followed. Swano's testimony provides some evidence in that regard, and there may be more. Without giving Bracy and Collins the opportunity to present that evidence to Judge Hart, their claim of conflict can only be resolved on the basis of speculation, as my colleagues agree. *Ante* at 690. In view of the grave and structural nature of the petitioners' claim, not to mention the fact that this is a capital case, which "magnifies the appearance of impropriety," (*ante* at 689), the petitioners are entitled to more from us.

My colleagues note that Bracy and Collins have long had access to some of the information that they profess an interest in exploring – the records of other trials over which Maloney presided, and the record of Maloney's own trial, for example – but have not pointed to anything that bolsters their claim of partiality. *Ante* at 691. But if petitioners can be faulted for not making the most of the available material, we can be faulted for being naive

about what the cold page of a trial record will reveal. A judge who wishes to be tough on the defendant need not adopt the manner of the Tasmanian Devil to do it. Maloney was by no account stupid. When he sold an acquittal, he wanted facts that he could hang his hat on (*e.g.*, Maloney Tr. 2571, 2669-70, 2682); and we have no reason to doubt that if he wanted to cultivate a pro-prosecution record to protect his interests as a bribe taker, he had the ability to do so discretely, without appearing to have abused his discretion as a trial judge. Cases are fixed not in the courtroom but in bars, bathrooms, and back hallways. If there is evidence of the kind Bracy and Collins hope to find, it is in the hands of persons familiar with these venues of injustice. Both Maloney and his bagman McGee are continuing their version of "stand[ing] tall" (*see United States v. Maloney*, 71 F.3d at 651-52), but Swano, Robert Cooley, and others may have something material to say, and the U.S. Attorney may be of some help in identifying whom the petitioners should approach. But it is likely that no one is going to talk without a subpoena, and petitioners should not be deprived of that instrument.

We are venturing into a realm noir with which, I may say with confidence, none of us is on intimate terms. We cannot simply assume that "the probability is slight" that discovery will yield Bracy and Collins anything. *Ante* at 691. Let them try. If their discovery proves fruitless, we can at least take comfort in the knowledge that we have given them every opportunity to prove that Maloney's corruption deprived them of a fair trial. We cannot, after all, have it both ways: we cannot criticize Bracy and Collins for speculation and at the same time deprive them

of the chance to render their theory anything more. I understand that Illinois has an interest in the finality of its judgments, and allowing the discovery that the petitioners seek would, if nothing else, portend a significant delay in the implementation of their death sentences. But having left Bracy and Collins to the mercies of a corrupt judge, the State should not be heard to complain in this matter. (In fact, its brief is utterly silent on this point.) The people of Illinois have as great an interest in the integrity of capital trials as Bracy and Collins do.

2.

My disagreement with the majority goes deeper than the question of discovery, however. In the end, I agree with Collins and Bracy that proof of the impact Maloney's corruption had, or probably had, on the petitioner's trial is unnecessary. We do not know, and we likely will never know, what Maloney thought about Bracy and Collins. But we have a pretty clear picture of how he viewed justice. The price tag may have varied, but as Maloney's conviction proves, justice was for sale in Maloney's courtroom to the defendants who could afford to pay, even when they were charged with the most heinous of crimes. That fact carries far more significance than the majority is willing to recognize. As this court acknowledged in *Del Vecchio*, in considering whether a biasing influence requires the disqualification of a judge, "we begin . . . by presuming 'the honesty and integrity of those serving as adjudicators.' " 31 F.3d at 1375 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975)). That presumption, as my colleagues acknowledge, is "obviously inapplicable here." *Ante* at

688. Maloney was not Louis Garippo, an esteemed and honest judge whose impartiality was argued to have been potentially compromised by his prior involvement with the defendant as a prosecutor. *See Del Vecchio*, 31 F.3d at 1375-80 (majority); *id.* at 1398 (Cummings, J., dissenting); *id.* at 1399 (Cudahy, J., dissenting); *id.* (Ripple, J., dissenting). Nor was he even Otto Kerner, a judge whose crimes pre-dated his service on the bench. *See United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976, 94 S.Ct. 3183, 41 L.Ed.2d 1146 and *cert. denied*, 417 U.S. 976, 94 S.Ct. 3184, 41 L.Ed.2d 1146 (1974). Maloney was a criminal who, as a judge, transformed his very office into a racketeering enterprise.

Faced with the possibility of vacating numerous convictions obtained in Maloney's courtroom, we would like to believe that he was capable of the impartiality that the Fourteenth Amendment requires when no money changed hands. But how can we? Once he embarked on the path of bribe taking, Maloney had forsaken his judicial oath. Justice was a mere commodity to him, defendants nothing more than a profit center. His deviation from the path of righteousness was not, moreover, momentary and uncharacteristic; it was cold, calculated, and spanned a period of years, if not the entirety of his tenure on the bench. Thus, Maloney's "bias," if we can call it that, cannot be conveniently compartmentalized. *Cf. Diversified Numismatics, Inc. v. City of Orlando, Florida*, 949 F.2d 382, 385 (11th Cir.1991) (per curiam). We may no more treat Maloney as an impartial arbiter for constitutional purposes than a delusional megalomaniac who locks a judge in the closet, dons a black robe, and hoodwinks everyone with a credible impersonation of Oliver

Wendell Holmes. Maloney's willingness to exchange money for the freedom of those charged with the most abhorrent crimes displayed his scorn for the very concept of justice.

By demanding proof that Maloney's corruption either had or likely had an identifiable impact on the petitioners' trial, we fail to come to grips both with the gravity of Maloney's offense and with the constitutional imperative that the accused be tried before a judge of integrity and impartiality. "[T]o perform its high function in the best way, 'justice must satisfy the appearance of justice.' " *Aetna*, 475 U.S. at 825, 106 S. Ct at 1587 (quoting *Murchison*, 349 U.S. at 136, 75 S.Ct. at 625). We said in *Del Vecchio* that "bad appearances alone [do not] require disqualification" (31 F.3d at 1372), but that an external influence requires the judge's disqualification when "the influence[ ] involved str[ikes] at the heart of human motivation, that an average man would find it difficult, if not impossible, to set the influence aside" (*id.* at 1373). My colleagues and I have been discussing Maloney's bribetaking as just another "bias" or "influence," something external to his personality, or at least some severable part of it, that at most "might" have given him the "incentive" to behave in a particular fashion on occasions when he was not bribed. But there is a more malevolent side to Maloney's offense that cannot be ignored. Maloney's bribetaking removes him from the category of the "average" man we addressed in *Del Vecchio*. We are speaking in this case about what motivates a *criminal*, and this implicates a far darker set of impulses than we confront in the usual bias case. The question we should be asking ourselves is not what impact the lack of a bribe

had on Maloney's decisionmaking in a particular case, but what his willingness to accept a bribe tells us about his view of judging. Maloney proved himself willing to acquit defendants charged with capital offenses for a few thousand dollars. The victims of those crimes, their families, the people of Illinois, the concept of justice, were apparently worth no more to him. Why should we assume that defendants were worth anything more to Maloney? How, in particular, can we trust Maloney to have treated a defendant fairly when that defendant had not offered him any money?[1] If due process means anything, I think we must assume that Maloney's corruption pervaded his work as a judge. The Supreme Court could not have put it more clearly: "[W]hen the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired."

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[1] Consider the words of a government attorney who prosecuted Maloney:

> As a judge [Maloney] was tough and hard-nosed. Many prosecutors liked working in his courtroom because he was tough and hard-nosed. But one of the things that I have heard over and over again from lawyers in the community is that he took it far too far; that he was ruthless; that he heartlessly meted out sentences without any compassion. [T]he only time there was compassion that we can see has to do with the times in which money was being passed.

United States v. Thomas J. Maloney and Robert McGee, No. 91 CR 477, Sentencing Tr. 559-60 (N.D.Ill. July 21, 1994) (remarks of Assistant United States Attorney Scott Mendeloff).

Vasquez v. Hillery, 474 U.S. 254, 263, 106 S.Ct. 617, 623, 88 L.Ed.2d 598 (1986).[2]

Although Maloney's crimes reveal no fealty to his oath as a judge, my colleagues nonetheless refuse to relinquish the presumption that he acted fairly when not bribed. The notion that "a judge who accepts bribes in some cases is corrupt in all" is not "a sufficiently compelling empirical proposition," they say, to treat this case as if the government had bribed Maloney to convict the petitioners. *Ante* at 690. But this is not an empirical matter. We cannot assign a value of x to a judge's ability to be fair, divide it by y (y representing Maloney's bribe taking), and determine whether the result is less than the constitutionally minimal level of impartiality, z. Like so many other elements of our democracy, justice requires a leap of faith: faith that the defendant is in fact presumed

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[2] I recognize, of course, that there are prosecution-minded judges and defense-minded judges and that although these predispositions can have a very real impact on the kind of trial the parties receive, we ordinarily do not recognize this bias as a constitutional deprivation. *See ante* at 688; *see also Del Vecchio*, 31 F.3d at 1390-91 (Easterbrook, J., concurring). Judges are, after all, human beings, and we dare not fool ourselves into thinking that any judge can completely divorce herself from her own experiences and predilections. *Id.* at 1372 (majority); *see also* Benjamin N. Cardozo, The *Nature of the Judicial Process* 168-69 (Yale Univ. Press 1921). But the distinction between the honest judge, who labors to varying degrees of success to rise above his prejudices, and the dishonest judge, who willingly abandons his oath and yields to the coarsest of proclivities, cannot be overstated. We simply have no business assuming that a judge who is willing to acquit an accused murderer for a few thousand dollars will make any effort to protect the rights of a defendant who has not greased his palm.

innocent until proven guilty beyond a reasonable doubt; faith that the prosecutor and defense counsel alike will act as zealous advocates for their principals within the confines of law and ethics; faith that the trial judge will favor no party but will strive "to hold the balance nice, clear, and true between the state and the accused." *Tumey*, 273 U.S. at 532, 47 S.Ct. at 444. Maloney's crimes shatter that faith. We have no reason to believe that had Bracy and Collins possessed sufficient funds and willing attorneys, they could not have bought acquittals from Maloney. That alone suggests that Maloney's was not the court of "law" to which Bracy and Collins were entitled as the forum for their trial. We do have reason, based on Swano's testimony, to believe that Maloney's corruption extended beyond the cases in which he accepted a bribe, and that Maloney saw unfixed cases as an opportunity to "screw" the defendant and thereby further his own ends as a bribe taker. No "empirical" proof is necessary to demonstrate that the petitioners did not stand equal before the law in Maloney's courtroom.

I realize, of course, that Bracy and Collins were convicted by a jury, not by Maloney. Jurors have minds of their own; they can and do defy the expectations of the judge. That is but one reason that the jury has been viewed by some as "the very palladium of free government." *The Federalist* No. 83, at 499 (Alexander Hamilton) (Clinton Rossiter ed. 1961); *see Duncan v. Louisiana*, 391 U.S. 145, 155-58, 88 S.Ct. 1444, 1451-52, 20 L.Ed.2d 491 (1968). But we cannot ignore the influence that the judge retains even in a jury trial. *See Walker v. Lockhart*, 726 F.2d 1238, 1259 (8th Cir.1984) (en banc) (Bright, J., dissenting), *cert. dismissed*, 468 U.S. 1222, 105 S.Ct. 17, 82 L.Ed.2d 912

(1984), and *cert. denied*, 478 U.S. 1020, 106 S.Ct. 3332, 92 L.Ed.2d 738 (1986). I do not refer so much to the ability of the judge to communicate his opinions to the jury through raised eyebrows, choice bits of sarcasm, and questioning of the witnesses that strays into advocacy, although this happens. *E.g., Dellinger*, 472 F.2d at 386-88; *see also United States v. Filani*, 74 F.3d 378, 387 (2d Cir.1996); *Bufford v. Rowan Cos.*, 994 F.2d 155, 159 (5th Cir.1993). I mean the extraordinary ability of the trial judge to shape the trial itself. It is she who decides what evidence the jury may hear, how counsel may behave in front of the jury, what arguments may be made, how they may be made, what legal principles the jury must apply, and even, to a significant degree, who will sit on the jury. Thus, even when the verdict is not entrusted to her, a partial judge retains great influence, if not directly upon the jury, then upon the myriad events that culminate in the jury's decision. *See Tyson v. Trigg*, 50 F.3d 436, 439 (7th Cir.1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 697, 133 L.Ed.2d 655 (1996).[3]

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[3] In this case there were plenty of issues that implicated Judge Maloney's discretion and thus his ability to influence the case against Bracy and Collins: the credibility questions presented by the petitioners' motion to suppress key evidence; the bolstering of prosecution witnesses; the collateral impeachment of defense witnesses; improper prosecution argument to the jury; the denial of a continuance prior to the sentencing hearing; and the refusal to sever the sentencing hearings. Viewed singly, none of Maloney's rulings on these issues may seem critical to the outcome of the case; but as my colleagues concede, the cumulative effect of these rulings may be "greater than we imagine." *Ante* at 690 (citing *Tyson*, 50 F.3d at 439).

Our own ability to monitor the influence of the trial judge, and to discern the taint of partiality, is narrowly circumscribed. Appellate review of the mundane decisions that can make or break a party's case (the exclusion or admission of a key piece of evidence, for example) typically is quite limited. *E.g., United States v. Marshall*, 75 F.3d 1097, 1109 (7th Cir.1996) (evidentiary issues); *United States v. Pulido*, 69 F.3d 192, 204 (7th Cir.1995) (limitations on cross-examination); *United States v. Fish*, 34 F.3d 488, 495 (7th Cir.1994) (request for continuance); *United States v. $94,000.00 in U.S. Currency*, 2 F.3d 778, 788 (7th Cir.1993) (questions posed on voir dire). In the rare instance that we find error, it is more often than not deemed harmless. *E.g., Jones v. Page*, 76 F.3d 831, 855-56 (7th Cir.1996). Even errors of constitutional dimension may be labelled benign on review. *Tyson*, 50 F.3d at 446-47. Theoretically, we could require a more searching review of the record when there is evidence that the trial judge was corrupt, but we would be fooling ourselves to think that even our best efforts would suffice to expose the ways in which the judge's criminal behavior may have tainted the trial. *See United States v. Guglielmini*, 384 F.2d 602, 605 (2d Cir.1967) ("Few claims are more difficult to resolve than the claim that the trial judge, presiding over a jury trial, has thrown his weight in favor of one side to such an extent that it cannot be said that the trial has been a fair one."), *cert. denied*, 400 U.S. 820, 91 S.Ct. 38, 27 L.Ed.2d 48 (1970). So much goes on in the courtroom that the written record can never reveal. Why else do we routinely grant so much deference to the trial judge, who sees and hears the witnesses first hand, who supervises the trial from start to finish, who can best

gauge the impact of any development upon the jury before him? Our acquiescence in the decisions of the trial court is dictated as much by pragmatism as by principle.

It is no answer to the charge of corruption that Maloney's discretionary rulings on their face appear to fall within the realm of reason. *See ante* at 690. All that means is that a reasonable judge might have rendered the same rulings. But we assume that the reasonable judge does not act for malignant ends, that she exercises

> a sound judicial discretion, enlightened by intelligence and learning, controlled by sound principles of law, of firm courage combined with the calmness of a cool mind, free from partiality, not swayed by sympathy nor warped by prejudice nor moved by any kind of influence save alone the overwhelming passion to do that which is just.

Davis v. Boston Elevated Ry. Co., 235 Mass. 482, 126 N.E. 841, 844 (1920); *see also* Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 784 (1982) ("discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles" '") (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (C.C.Va.1807) (No. 14,692d) (Marshall, C.J.)). If, on the other hand, a judge exercises her discretion for invidious reasons, she has exceeded her authority. *See* 1 Steven Alan Childress and Martha S. Davis, FEDERAL STANDARDS OF REVIEW, § 4.01 at 4-2 through 4-3 (2d ed. 1991); *Wong Wing Hang v. INS*, 360 F.2d 715, 719 (2d Cir.1966) (Friendly, J.). But, except in the rare case in which the judge's agenda is obvious, we cannot expect to autopsy a trial and find evidence that the cancer of the judge's

corruption has invaded her decisionmaking. When the majority finds it "unlikely" that the discretionary trial rulings of which Bracy and Collins complain were the product of Maloney's corruption (*ante* at 690), it is doing exactly what the petitioners are faulted for doing: speculating.

We cannot, therefore, hide behind the jury's verdict. We simply cannot know what impact Maloney's corruption may have had on the trial and on the jury's decision. *Cf. Vasquez*, 474 U.S. at 260-64, 106 S.Ct. at 622-24 (discrimination in grand jury not rendered harmless by subsequent trial). The evidence against Bracy and Collins may seem to us overwhelming, but that does not strip them of their right to due process. "No matter what the evidence was against [them], [they] had the right to have an impartial judge." *Tumey*, 273 U.S. at 535, 47 S.Ct. at 445. Nor, as a matter of principle, can the process of presumably unbiased appellate review cure the taint of Maloney's corruption; Bracy and Collins were "entitled to a neutral and detached judge in the first instance." *Ward*, 409 U.S. at 61-62, 93 S.Ct. at 84.

Ultimately, although my colleagues concede the plausibility of the notion that a judge's corruption cannot be confined to the cases in which he accepts a bribe, they decline to embrace it, finding the consequences "unacceptable." *Ante* at 689. Maloney alone presided over some 6,000 cases. *See United States v. Thomas J. Maloney and Robert McGee*, No. 91 CR 477, 1994 WL 96673, Sentencing Tr. 571 (N.D.Ill. July 21, 1994). My colleagues believe, and perhaps rightly so, that we cannot vacate the convictions of Bracy and Collins without calling into doubt the many other judgments entered not only by Maloney (the only

Illinois judge thus far convicted of corruption in murder prosecutions), but also the seventeen other Cook County judges found guilty of taking bribes. *Ante* at 689. Given the expanse of time that has passed since these judgments were entered, were retrials ordered across the board, there are doubtless many guilty individuals, murderers even, who would go free. It is an appalling prospect. But we must not allow ourselves to become paralyzed by the possibilities. We decide today not the validity of every judgment ever rendered by a corrupt judge, but the fate of two individuals who are about to pay the ultimate criminal penalty without having been afforded the most basic rudiment of due process. What are we to say to Bracy and Collins, that they had the right to an honest, impartial judge but that the breadth of past corruption in the Illinois judiciary makes it too costly for us to enforce that right? Are they to become the latest victims of Maloney's bribe taking, and we his accomplices after the fact? The Constitution was not written for easy cases and likeable defendants, and we are sworn to uphold it no matter what the result. Knowing full well the perils that may confront us if we insist that defendants be given trials before honest judges, I believe we have no choice but to take the first step down that path here. We cannot turn our backs on the Constitution, especially when the petitioners' very lives are at stake. If nothing else, "[d]eath is factually different. Death is final. Death is irremediable. Death is unknowable." Anthony G. Amsterdam, Tr. of oral argument, *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (No. 74-6257), quoted in MAY IT PLEASE THE COURT . . . 233 (Peter Irons & Stephanie Guitton eds. 1993); *see also Furman v. Georgia*,

408 U.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring).

3.

The quality of justice we can claim to have achieved in this nation is not measured by what our best judges can do but by what the worst of our judges have done. Today we say that Thomas Maloney's handiwork is good enough. An Illinois defendant, it appears, is entitled to appear before a judge who is not under *indictment* for bribery, Ill. S.Ct. R. 56(a)(1), but today's opinion deprives him of the right to appear before a judge who is not *engaged* in bribery. Bracy and Collins will thus have to be content with the judgment of a criminal. I do not know which I find more shocking: the base quality of justice that Bracy and Collins received in the Illinois courts, or our holding today that the Constitution requires no more.

4.

I must, finally, say a word about the majority's invocation of *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). *Ante* at 689. *Teague* generally bars the application of "new rules" of federal law on habeas review. But *Teague's* proscription is not jurisdictional, *Collins v. Youngblood*, 497 U.S. 37, 41, 110 S.Ct. 2715, 2718, 111 L.Ed.2d 30 (1990), and if the state fails to invoke *Teague*, we may, but are not compelled, to do so ourselves, *Goeke v. Branch*, ___ U.S. ___, ___, 115 S.Ct. 1275, 1276, 131 L.Ed.2d 152 (1995) (per curiam). *See Stewart v. Lane*, 60 F.3d 296, 304-05 (7th Cir.1995) (Ripple, J., concurring), *supplemented on reh'g*, 70 F.3d 955, *petition for cert. filed*

(Jan. 16, 1996) (No. 95-7444). The state has never cited *Teague* as a defense to the petitioners' claim of judicial corruption, and I am not convinced that the circumstances of this case warrant our sua sponte reliance upon it as an alternate basis for denying the petitioners the relief they seek. *See Stewart* at 304 (concurrence) ("Because, in a capital case, invocation of *Teague* can often mean the difference between life and death for the petitioner, we need to be particularly circumspect as to when we shall invoke *Teague* sua sponte."). The majority offers no reason why *Teague* is particularly apposite here, and I discern none. Since when is it news that the accused has the right to be tried before an honest, impartial judge? I had rather thought that to be a cornerstone of our system of justice. And indeed, Supreme Court precedent reveals the notion to be anything but novel. The Court's 1927 decision in *Tumey*, for example, holds that when a judge has a financial incentive to see the defendant convicted, he is not sufficiently impartial for constitutional purposes. 273 U.S. at 531-35, 47 S.Ct. at 444-45. This case is, in a real sense, but a factual variant of *Tumey*. I grant that no court has yet found it necessary to hold that a judge engaged in serial bribetaking is not the impartial adjudicator that the Constitution requires, and in that respect one might argue that the rule the petitioners posit "was not *dictated* by precedent existing at the time [their] conviction[s] became final." *Caspari v. Bohlen*, ___ U.S. ___, ___, 114 S.Ct. 948, 953, 127 L.Ed.2d 236 (1994) (quoting *Teague*, 489 U.S. at 301, 109 S.Ct. at 1070) (emphasis in *Teague*). But surely common sense counts for something in the *Teague* analysis. The Greylord prosecutions had not yet taken place in 1981 when Bracy and Collins were

tried, but the State of Illinois cannot claim to have been ignorant of the notion that bribery is illegal and that judges who accept bribes belong in prison, not on the bench. There is, in short, nothing surprising in the petitioners' claim. The prospect of retrying Bracy and Collins (not to mention other defendants convicted by or before Maloney) is an onerous one for the State, but that burden has nothing to do with the novelty of the principle that a defendant is entitled to a judge who is not on the take. Our invocation of *Teague* in this circumstance makes that precedent look less like a shield protecting the State from the retroactive application of new rules than a sword depriving habeas petitioners of constitutional rights that have long been recognized.

5.

Eighteen judges of the Cook County Circuit Court have been convicted of corruption in the last decade. We would like to think that rampant corruption on the Cook County bench is a relic of the past. But it will not be, it cannot be, so long as we refuse to recognize just how fundamentally at odds this corruption is with the constitutional guarantee of due process. Like Terrence Hake, who risked his own career to expose the criminals clothed in the robes of judges, we too have a role to play in restoring integrity to the bench. We cannot embrace the judicial services of outlaws without deepening the stain their crimes have already left on our courts.

I respectfully dissent.

96-6133 BRACY, WILLIAM V. GRAMLEY, WARDEN

The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to the following question: Whether a habeas petitioner who was convicted of a capital offense and sentenced to death in a trial before a judge who admittedly accepted bribes in other contemporaneous criminal cases is entitled to discovery to support his claim that he was denied the right to a trial before an impartial judge. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 21, 1997. The brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 21, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 7, 1997. Rule 29.2 does not apply.

96-6298 LINDH, AARON V. MURPHY, WARDEN

The motion of petitioner for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted limited to Question 1 presented by the petition. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 21, 1997. The Brief of respondent is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 21, 1997. A reply brief, if any, may be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 7, 1997. Rule 29.2 does not apply.

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(5)

No. 96-6133

In The

Supreme Court of the United States

October Term, 1996

WILLIAM BRACY,

Petitioner,

vs.

RICHARD GRAMLEY, Warden
Pontiac Correctional Center,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

BRIEF FOR THE PETITIONER

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26 pp

QUESTION PRESENTED FOR REVIEW

Whether a habeas petitioner who was convicted of a capital offense and sentenced to death in a trial before a judge who admittedly accepted bribes in other contemporaneous criminal cases is entitled to discovery to support his claim that he was denied the right to trial before a fair and impartial judge?

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The opinion of the Court of Appeals (J.A. 73-118) is reported at 81 F. 3d 684 (7th Cir. 1996). The opinion of the District Court is reported at 868 F.Supp. 950 (N.D. Ill. 1994).

STATEMENT OF JURISDICTION

On April 12, 1976, the United States Court of Appeals for the Seventh Circuit entered its opinion affirming the judgment of the District Court to dismiss the Petition for a Writ of Habeas Corpus. *Bracy v. Gramley*, 81 F. 3d 684 (7th Cir. 1996). The Petition for Rehearing and Suggestion for Rehearing en banc was denied on June 26, 1996. The Petition for a Writ of Certiorari was timely filed on September 24, 1996, within ninety days of the order denying rehearing. The Supreme Court's certiorari jurisdiction is properly invoked pursuant to Title 28 United States Code § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> . . . nor shall any state deprive any person of life, liberty, or property without due process of law; nor to deny any person within its jurisdiction the equal protection of the laws.

Federal Habeas Corpus Rule 6(a) provides:

A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise. If necessary for effective utilization of discovery procedures, counsel shall be appointed by the judge for the petitioner who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g).

STATEMENT OF THE CASE

The Petitioner William Bracy and Roger Collins were tried jointly in the Circuit Court of Cook County, Illinois before former Judge Thomas Maloney and a jury on charges of murder, armed robbery and kidnapping. The jury found them guilty on all counts and sentenced them to death. Both Petitioner and Collins then jointly appealed their convictions and sentences to the Illinois Supreme Court and the judgments were affirmed. *People v. Collins*, 196 Ill. 2d 237, 478 N.E. 2d 267 (1985). Mr. Bracy and Mr. Collins then filed a joint petition in the Cook County Circuit Court pursuant to the Illinois Post Conviction Hearing Act (Ill. Rev. Stat. ch. 38, para. 122-1 et seq., 1985). The denial was affirmed by the Illinois Supreme Court. *People v. Collins*, 153 Ill. 2d 130, 606 N.E. 2d 1137 (1992).

On August 31, 1993, William Bracy filed a Petition for a Writ of Habeas Corpus pursuant to Title 28 United States Code § 2254 in the United States District Court for the Northern District of Illinois, Eastern Division. Mr.

Bracy's case and a separate case involving Roger Collins were both assigned to the Honorable William T. Hart. On August 24, 1994, Judge Hart entered an order dismissing both petitions and denying the requests for discovery and an evidentiary hearing. *U.S. Ex Rel. Collins v. Wellborn*, 868 F.Supp. 950 (N.D. Ill. 1994). Petitioner appealed the judgment of the District Court to the United States Court of Appeals for the Seventh Circuit. The judgment of the District Court was affirmed by the Court of Appeals. *Bracy v. Gramley, supra.*

The Petitioner, his co-defendant, Roger Collins, and another individual, Murray Hooper, were indicted for armed robbery and murder of Frederick Lacy, R.C. Pettigrew, and Richard Holliman. Hooper was tried separately. The State presented evidence that on November 12, 1980, Lacy, Pettigrew and Holliman were taken from an apartment at 2240 South State Street in Chicago, driven to a viaduct at Roosevelt Road and Clark Street, and shot to death. TR 463, 465-473, 773-777. All three were bound with rope and killed by shotgun blasts and gun shots. *Id.*

The principal witness against Petitioner and Collins was an individual named Morris Nellum, who pleaded guilty to a reduced charge and was sentenced to a term of probation. TR 525. Nellum testified that he went to the apartment at 2240 South State Street and observed Collins, Petitioner and Hooper in the company of the victims. TR 491. The victims were subsequently taken from the apartment and placed in a red Oldsmobile. TR 501. Collins asked Nellum to follow them in a brown Cadillac. TR 496, 497. When Nellum arrived at the viaduct at Roosevelt and Clark, he heard shotgun blasts. TR

510, 511. He then saw Petitioner and Hooper get into Petitioner's car and Collins get into the Cadillac with Nellum, and they all drove off. *Id.* Petitioner was carrying a sawed-off shotgun. *Id.* Later, Nellum accompanied Collins, who threw the two handguns into Lake Michigan. TR 514-517.

A witness testified that she saw the Petitioner in the parking lot of the apartment building on South State Street in the company of one of the victims. TR 412, 413, 422, 433. Another witness, Christina Nowell, testified that Petitioner took a 38 caliber Charter Arms revolver from her and he later told her that he murdered some people and threw her hand gun in the Chicago River. TR 632-646, 649, 650. A Charter Arms revolver and a 357 Ruger handgun were recovered from Lake Michigan by police divers, after they were led there by Nellum. TR 518, 519. The guns were too rusty to allow for an exact ballistics comparison. TR 678-702. However, the serial number on the Charter Arms revolver was the same as the one that was registered to Nowell. TR 655, 666. Two pieces of rope were found in the apartment at 2240 South State Street, and they had the same characteristics as the rope which was used to bind the victims. TR 602-608, 617, 620, 760, 761.

Both Petitioner and Collins presented alibi defenses. Petitioner called his sister, Barbara Harris, who testified that he had dinner with her and her husband on the evening of November 12, 1980. TR 1056-1066. Collins called his girlfriend, Beatrice Mack, and several other witnesses, who testified that Mack and Mr. Collins spent the evening and afternoon together on November 12. TR 969-975, 1022-1-26, 1031-1035, 1043, 1047. Both Petitioner

and Collins testified on their own behalf and other witnesses were called by the defense to impeach Morris Nellum. TR 809, 863-864, 911-953, 1104-1110, 1147-1148.

The jury elected to disbelieve the defense witnesses and to believe Morris Nellum and returned guilty verdicts on all counts. In a separate sentencing proceeding, the Petitioner and Mr. Collins were sentenced to death.

Thomas J. Maloney was the Cook County Circuit Court Judge who presided over Petitioner's trial. In this capacity, Judge Maloney made a number of discretionary rulings that potentially affected the outcome of Petitioner's case. He appointed Robert McDonald, the attorney who represented Petitioner throughout the trial and penalty phase. TR 32. Over objection, he excused the only African American panel member for cause. TR 101. He denied co-defendant Roger Collins' motion to suppress evidence. TR 388. He declined to give any of the proposed instructions offered by the defense, including those dealing with the credibility of the accomplice. TR 1207-1214. He declined to grant Roger Collins' request for a separate penalty hearing. TR 1433. He declined to grant a short continuance prior to the commencement of the penalty phase although Petitioner's counsel announced that he was not ready to proceed. TR 1425, 1447. Over objection, he admitted evidence of an unadjudicated homicide in Arizona involving Petitioner. TR 1494, 1503. As the Seventh Circuit dissent observed, he made a number of other discretionary rulings that had a potential cumulative impact on the outcome of Petitioner's trial, including rulings on the credibility of witnesses, evidentiary rulings, and rulings to permit the attorneys for the

State to make objectionable arguments to the jury. *Bracy v. Gramley*, 81 F. 3d at 704, fn. 3.

In June, 1991, Thomas Maloney was himself indicted for bribery, racketeering and income tax evasion for acts committed while he held judicial office. (J.A. 16-35) The attorney representing Petitioner in state post-conviction proceedings attempted to raise a claim based upon Maloney's misconduct in the final stages of the post-conviction appeal, when the information first became public. *U.S. Ex Rel. Collins v. Wellborn*, 868 F.Supp. 991. However, the Illinois Supreme Court declined to consider it. *Id.* In his Federal Habeas Corpus Petition, Petitioner pleaded a due process violation based upon judicial corruption. (J.A. 5, 6) Petitioner alleged that most of Judge Maloney's discretionary rulings at trial were made in favor of the state, and that Judge Maloney had a reputation for being a strict judge who was "partial to law and order". *Id.* Petitioner alleged that there is cause to believe that Judge Maloney's discretionary rulings may have been influenced by a desire on his part to allay suspicion. *Id.* The State responded that since there was no evidence that Judge Maloney had been bribed in Petitioner's case, there was no reason to believe that he was unfair. (J.A. 7-9)

In the Reply to the State's response to the Petition for Habeas Corpus, Petitioner pointed out that Judge Maloney's pattern of corrupt activities on the bench occurred during the time of Petitioner's trial. (J.A. 11) Petitioner requested discovery and an evidentiary hearing. *Id.* In connection with this request, Petitioner tendered a copy of the Maloney indictment. (J.A. 16-35) In Count II of the indictment, Defendant Maloney was charged with racketeering pursuant to Title 18 United States Code,

§ 1962(c). (J.A. 26-32) Five of the predicate acts supporting the RICO count consisted of soliciting and taking bribes to fix criminal cases. *Id.* Four of these cases occurred in 1981 and 1982, around the time of Petitioner's trial. *Id.* In another instance, Maloney took a bribe and granted an acquittal in a multiple defendant homicide case, one month after Petitioner's trial. (J.A. 27) Petitioner presented evidence that Judge Maloney generally had a reputation as being prosecution oriented.[1] Petitioner also presented evidence that Judge Maloney accepted a bribe to fix a murder case in October 1980, and thus his pattern of judicial misconduct began well in advance of Petitioner's trial. (J.A. 36, 37)

During oral argument in the District Court, Petitioner's counsel indicated in greater detail the discovery that was being sought. (J.A. 41-43) He requested the opportunity to review the transcript of Judge Maloney's trial and to depose the Government witnesses who might be able to provide material information on Judge Maloney's behavior in those cases in which he was not bribed.[2] *Id.* He requested the opportunity to do an analysis of Judge Maloney's rulings to see if there were any

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[1] According to a newspaper account of the Maloney trial, attorney William Swano testified, upon being first informed that Judge Maloney was willing to receive bribes, that he was incredulous because, "Judge Maloney was so prosecution oriented . . . I wanted to hear it from the horse's mouth". (J.A. 36)

[2] The transcript of the *Maloney* trial was sealed and was not unsealed until August 1994, the same month that the District Court announced its decision dismissing the Petition. *See, Bracy v. Gramley*, 81 F. 3d at 691.

discernable patterns. *Id.* He requested reasonable access to the material in the hands of government lawyers who were responsible for the Maloney prosecution. *Id.*

Following oral argument, but before the District Court decided the case, Mr. Collins through his counsel made a supplemental motion for discovery in connection with the Maloney claim. (J.A. 50, 51) In this motion, Collins proffered that Petitioner's court appointed counsel, Robert McDonald, was reported to be the former law partner of Maloney. *Id.* Attached to the motion as an exhibit was the government's sentencing memorandum in the Maloney case. (J.A. 52-72) The memorandum stated that, "Thomas Maloney's life of corruption was considerably more expansive than that proved at trial". (J.A. 54) The memorandum noted that years before he became a judge, Maloney was a criminal defense lawyer who regularly paid bribes to fix criminal cases. (J.A. 55-59) In one instance, he was part of an effort to pay a bribe to secure an acquittal for La Cosa Nostra hit-man Harry Aleman, on a homicide charge. (J.A. 60-66) Maloney himself was involved with La Cosa Nostra and may have secured his judicial appointment with the assistance of his organized crime connections. (J.A. 66) The Government's sentencing memorandum noted that while on the bench, Maloney accepted bribes in a number of cases other than those mentioned in the indictment. (J.A. 66-68) The memorandum indicated that as part of its investigation, the Government did a statistical analysis of some of Judge Maloney's rulings.[3]

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[3] The Government's memorandum makes reference to one Herbert Barsy, a corrupt attorney who regularly practiced before Judge Maloney, and goes on to state, " . . . a review of computer printouts listing all of Barsy's felony cases before Judge Maloney reveals that Barsy obtained not guilty results in all six of the cases he had before Judge Maloney". (J.A. 67)

The District Court ruled that Petitioner and Mr. Collins did not make an adequate showing to justify discovery because, "They do not point to any particular adverse ruling that would have been favorable to them before another judge". *United States Ex Rel. Collins v. Wellborn*, 868 F.Supp. at 991. In upholding the denial of discovery by the District Court, the Seventh Circuit majority faulted Petitioner's counsel for not conducting their own statistical analysis of Judge Maloney's rulings in this and other cases, and for not seeking to support their discovery motion with excerpts of the transcript in the *Maloney* case, although it acknowledged that the transcript was sealed until August 1994, when the District Court in this case announced its decision. *Bracy v. Gramley*, 81 F. 3d at 691. The Court of Appeals however did have access to transcript when it wrote its opinion, and thus the dissent was able to point out at least one instance where according to the testimony of William Swano, a witness who cooperated with the Government, Judge Maloney unexpectedly convicted a defendant in a weak prosecution case, after Swano opted not to pay him a bribe. *Bracy v. Gramley*, 81 F. 3d at 697. The testimony was that this was the only case that Swano ever lost in front of Judge Maloney, and Swano viewed this as an object lesson that bribes were essential to successful practice in Judge Maloney's court.

SUMMARY OF ARGUMENT

In the District Court, in support of his discovery request, Petitioner presented evidence of pervasive corruption on the part of the judge who presided over his trial. This included but was not limited to the numerous times in which Judge Maloney accepted bribes to fix cases while he was on the bench and his earlier career as a "fixer" lawyer with close ties to organized crime. This was a sufficiently specific showing under Federal Habeas Rule 6(a) to have required the District Court to grant discovery, particularly since the Due Process standard articulated by this Court does not require a showing of actual prejudice. Court sanctioned discovery was necessary in this case because most of the pertinent information was in the hands of Government lawyers, who were involved in the prosecution of Judge Maloney at the same time that this Habeas Petition was pending in the District Court, and the information in their possession would not have been made available to Petitioner's counsel, absent a court order. Discovery is also required in this case because of the need for greater reliability and fairness in proceedings involving imposition of the death penalty.

ARGUMENT

PETITIONER'S PROFFER OF A PATTERN OF JUDICIAL CORRUPTION OCCURRING CONTEMPORANEOUSLY WITH PETITIONER'S CAPITAL TRIAL WAS A SUFFICIENTLY SPECIFIC SHOWING TO REQUIRE THE ISSUANCE OF A DISCOVERY ORDER.

The discovery request in this case is governed by Habeas Corpus Rule 6(a) which in pertinent part provides:

> A party shall be entitled to invoke the processes of discovery available under the Federal Rules of Civil Procedure if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise.

The leading decision on discovery in Federal Habeas Corpus cases is *Harris v. Nelson*, 394 U.S. 286, 22 L. Ed. 2d 281, 89 S. Ct. 1082 (1969). This Court held in *Harris* that the Federal Rules of Civil Procedure do not apply automatically in habeas corpus cases. However, applicants for habeas corpus are entitled to careful consideration and plenary processing of their claims including full opportunity for presentation of relevant facts. 394 U.S. 298. District Courts may fashion appropriate procedure for development of the facts, including where appropriate the ordering of discovery. *Id.* at 299. With respect to the showing that must be made in order to justify a discovery order, the Court stated as follows:

> We do not assume that courts in the exercise of their discretion will pursue or authorize pursuit of all allegations presented to them. We are

> aware that confinement sometimes induces fantasy which has its basis in the paranoia of prison rather than in fact. *But where specific allegations before the court show reason to believe that the petitioner may, if facts are fully developed, be able to demonstrate that he is confined illegally and is therefore, entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for adequate inquiry. Id.* at 300. (emphasis supplied).

Although *Harris* was decided before the adoption of Rule 6, it is cited in the Advisory Commission Notes in support of the proposition that discovery may be employed to aid in developing the facts necessary to decide whether to order an evidentiary hearing. *See*, Advisory Commission Note to Rule 6 Governing § 2254 cases. The decision in *Blackledge v. Allison*, 431 U.S. 63, 81, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977) adopts the Advisory Commission interpretation. Discovery pursuant to Rule 6 is proper whenever it would help the court make a reliable determination with respect to the prisoner's claim. *Herrera v. Collins*, 506 U.S. 390, 402, 122 L. Ed. 2d 203, 113 S. Ct. 851 (1993).

Following this Court's decisions in *Harris* and *Blackledge*, lower Federal Courts have provided additional gloss on the standard applicable to consideration of discovery requests under Habeas Rule 6(a). A Rule 6(a) discovery request may be properly denied if supported only by conclusory allegations. *Ward v. Whitley*, 21 F. 3d 1355 (5th Cir. 1994). However, denial of a discovery request is an abuse of discretion if discovery is necessary to develop the facts of the claim. *Teague v. Scott*, 60 F. 3d 1167 (5th Cir. 1995). A blanket denial of discovery is an abuse of discretion if discovery is "indispensable to a fair

well rounded development of the facts". *East v. Scott*, 55 F. 3d 996, 1001 (5th Cir. 1995), citing *Coleman v. Zant*, 708 F. 2d 541, 547 (11th Cir. 1983).

In deciding whether to permit discovery, a court should be informed by the legal standard applicable to resolution of the underlying constitutional claim. *United States v. Armstrong*, ___ U.S. ___, ___ L. Ed. 2d ___, 116 S. Ct. 1480 (1996). Development of the legal standard applicable to judicial bias claims began with this Court's decision in *Tumey v. Ohio*, 273 U.S. 510, 523, 71 L. Ed. 749, 47 S. Ct. 437 (1927). In *Tumey*, this Court held that it violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case. The Court noted that the common law rule was that the slightest pecuniary interest of any officer, judicial or quasi-judicial, in resolving the subject matter which he was to decide, rendered the decision voidable. *Id.* at 524. This Court stated, "There was at the common law the greatest sensitivity over the existence of any pecuniary interest, however small or infinitesimal, in the justices of the peace." *Id.* at 525. Writing for the Court in *Tumey*, Chief Justice Taft noted that with only slight modification, the common law rule was embodied in the due process clause of the Fourteenth Amendment. *Id.* at 531. The Court went on to state:

> Every procedure which *would offer a possible temptation* to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to

> hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Id. at 532 (emphasis supplied).

The Court concluded in *Tumey* that the right to disqualify a judge, based upon pecuniary interest, existed regardless of the strength of the evidence against the accused. *Id.* at 535.

Following the decision in *Tumey*, this Court in *In Re Murchison*, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955), recognized that due process guarantees did not simply protect against actual bias, but that " . . . a possible temptation to the average man as judge . . . ", would suffice. The Court stated:

> Such a stringent rule may sometimes bar trial by judges who have no actual bias and who do their very best to weigh the scales of justice equally between the contending parties. *But to satisfy its high function in the best way "justice must satisfy the appearance of justice."*

Id. at 136 (emphasis supplied).

The strict rule of *Tumey* and *Murchison* was applied in *Ward v. Monroeville*, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972), wherein the village mayor also sat as judge in cases involving ordinance violations and traffic offenses, and the village's revenues were derived in large measure from fines assessed as a result of these violations. The Petitioner was convicted of a traffic offense and this Court reversed the conviction on due process grounds even though, as pointed out by the dissent, "The Ohio

mayor who judged this case had no direct financial stake in its outcome". 409 U.S. at 62.

Tumey and *Murchison* were also followed in *Aetna Life Insurance Company v. Lavoie*, 475 U.S. 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1985). There, an Alabama Supreme Court judge was disqualified to decide a case pending before him on appeal, where he was also a plaintiff in another case involving similar issues of law. This Court noted that it was not required to decide whether the Judge had actually been influenced since it was sufficient to determine that there was a "possible temptation". *Id.* at 825. In reversing the State Court judgment, this Court stated:

> Because of Justice Embry's leading role in the decision under review, we conclude that the *"appearance of justice"* will best be served by vacating the decision and remanding for further proceedings.

Id. at 828 (emphasis supplied).

In *Vasquez v. Hillary*, 474 U.S. 254, 263, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986), this Court noted that when the judge has a possible interest in the proceeding, there arises a presumption of prejudice. The Court stated:

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had *some basis* for rendering a biased judgment, his actual

> motivations are hidden from review, and we must presume that the process was impaired.

Id. at 263 (emphasis supplied).[4]

The rule that emerges from this Court's decisions on judicial bias is that a possible temptation to the "average man" is sufficient to establish a due process violation, and, as pointed out in *Ward*, Petitioner need not show that Judge Maloney had a direct financial interest in the outcome of this case. Once a possible temptation is established by the evidence, prejudice is presumed. The Seventh Circuit majority applied an incorrect legal standard in holding that Petitioner was not entitled to discovery because Petitioner could not show that the discretionary rulings of Judge Maloney in this case were the product of improper motive and judicial corruption. *Bracy v. Gramley*, 81 F. 3d at 691. In essence, the Seventh Circuit majority ruled that regardless of what it might uncover, an investigation would be futile simply because there was no suggestion that Judge Maloney accepted a bribe in this particular case. Petitioner made a preliminary showing that Judge Maloney was under a temptation to rule corruptly at the time of Petitioner's trial, because at the same time he was actively soliciting and accepting bribes to fix murder cases. This is sufficiently suggestive of a possible due process violation to justify issuance of a discovery order.

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[4] The presumption of prejudice that arises in instances of judicial bias is tantamount to those structural defects in the trial mechanism which defy harmless error analysis, such as that arising from denial of the right to counsel. *Brecht v. Abrahamson*, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993).

The granting of discovery was necessary in this case because there was no fact finding conducted in the state court and the information Petitioner was seeking is known to others and was unlikely to be made available absent a discovery order.[5] Petitioner made a preliminary showing of a pattern of corruption on the part of Thomas Maloney, including taking bribes in return for not guilty verdicts in murder cases at the same time as he sat as trial judge in Petitioner's case, and additional information from the Government indicating that the scope of judicial corruption extended well beyond the evidence presented in Maloney's criminal trial. In addition, there is evidence in the transcript of the Maloney trial that on at least one occasion Judge Maloney rendered a guilty verdict in a weak prosecution case as a means of advertising his desire to obtain bribes. This demonstrates a reasonable likelihood that formal discovery will uncover additional facts supporting a due process violation.

In the District Court, Petitioner sought to depose the accomplices who testified for the Government in the Maloney criminal trial. These witnesses were familiar with the day to day workings of the system in Judge Maloney's Court, and were likely to have significant insight as to the extent of the judicial corruption as well as the manner in which it affected cases in which Maloney did not receive bribes. In addition, these witnesses were

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[5] Referring to the Government witnesses who testified in the Maloney criminal trial, the Seventh Circuit dissent observed, "But it is likely that no one is going to talk without a subpoena, and petitioners should not be deprived of that instrument". *Bracy v. Gramley*, 81 F. 3d at 699.

familiar with events surrounding the bribe taking that occurred simultaneously with Petitioner's trial, and were in a position to give a precise account of what transpired during this period of time. Petitioner also sought to review witness statements and other information in the possession of the Government, as this material would enable Petitioner to identify others who possibly possessed relevant information.

In considering whether the District Court should have allowed these requests, it is useful to contrast this case with this Court's decision in *United States v. Armstrong, supra.* There the Court held that it was proper to deny discovery to defendants claiming a denial of equal protection because the Government had singled out African Americans for selective prosecution in crack cocaine cases. One reason that discovery was denied in that case was because there is a presumption of regularity supporting prosecutorial decisions. 116 S. Ct. 1486. In contrast, there is no presumption of honesty and integrity with respect to the rulings of Thomas Maloney, as the Seventh Circuit conceded in its opinion. *Bracy v. Gramley,* 81 F. 3d at 688. In addition, this Court in *Armstrong* was concerned about the tremendous burden that a discovery order would place upon the government in selective prosecution cases, and hence it required a "correspondingly rigorous standard for discovery in aid of such a claim". 116 S. Ct. 1488. In this case, discovery will involve a burden that is significantly less since Petitioner is mainly seeking access to the government's file in the Maloney criminal case, and the materials sought have already been assembled in connection with a prosecution that is now complete.

Finally, Petitioner's sentence of death further supports the conclusion that in the unique circumstances of this case, he is entitled to discovery on his due process claim. Because the penalty of death is "qualitatively different" from any other sentence, *Woodson v. North Carolina,* 428 U.S. 280, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976), this Court has required heightened standards of reliability in the procedures involved both in the imposition of the death penalty and at the trial stage of a capital case. *Beck v. Alabama,* 447 U.S. 625, 637-638, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980); *Lockett v. Ohio,* 438 U.S. 586, 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978). Because of the severity and finality of the death penalty, the Court has recognized that:

> "It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, *and appear to be,* based on reason rather than caprice or emotion."

Beck v. Alabama, supra, at 637-638, quoting *Gardner v. Florida,* 430 U.S. 349, 358, 51 L. Ed. 2d 393, 97 S. Ct. 1197 (1977) (opinion of Stevens, J.) (emphasis supplied).

The decision of the Seventh Circuit majority denying discovery does not comport with the requirements of heightened reliability in capital cases. In support of his discovery request, the Petitioner presented undisputed evidence that his trial and death penalty hearing were presided over by a corrupt judge who was actively engaged in accepting bribes to fix murder cases, evidence which the majority opinion acknowledged created an "appearance of impropriety". *Bracy v. Gramley,* 81 F. 3d at 690. In these circumstances, the heightened concern for reliability and the appearance of fairness in capital cases

mandates that the Petitioner not be executed without a full opportunity to investigate and prove his claim that he was denied his due process right to a trial before an impartial judge.

Throughout its history, this Court has exemplified the highest standard of judicial integrity and the rulings of this Court reflect a deep concern for public confidence in the judiciary. Allowing discovery and a full investigation of the facts in this case will send a strong message that this Court remains firmly committed to this view. As the Seventh Circuit dissent correctly observed, "The people of Illinois have as great an interest in the integrity of capital trials as Bracy and Collins do". *Bracy v. Gramley*, 81 F. 3d at 699.

CONCLUSION

The decision of the Court of Appeals should be reversed. This Court should enter an order directing the District Court to permit discovery under Habeas Corpus Rule 6(a).

Respectfully submitted,

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(6)

No. 96-6133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM BRACY,

Petitioner,

v.

RICHARD B. GRAMLEY, Warden,
Pontiac Correctional Center,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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Printed by Authority of the State of Illinois (P.O. 36746—60—3-20-97)

30 pp

QUESTION PRESENTED FOR REVIEW

Whether a habeas petitioner who was convicted of a capital offense and sentenced to death in a trial before a judge who admittedly accepted bribes in other contemporaneous criminal cases is entitled to discovery to support his claim that he was denied the right to trial before a fair and impartial judge?

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STATEMENT OF THE CASE

The Statement of the Case contained in petitioner's brief is generally correct. However, respondent wishes to recite a few additional salient facts which are contained in the record.

As to the trial court's denial of co-defendant Roger Collins's motion to suppress evidence, (TR 388), that ruling was deemed proper by the Illinois Supreme Court when reviewed on direct appeal. *People v. Collins,* 106 Ill. 2d 237, 265-266, 478 N.E.2d 267, 278-279 (1985).

After the completion of the guilt phase of the trial, counsel for co-defendant Collins requested a separate sentencing hearing for his client, notwithstanding his assertion that "there is no conflict here, and there wasn't any conflict *per se* between the two defendants[.]" (TR. 1432). Counsel based his request solely on the fear that the State would use as aggravation evidence of an unrelated Arizona double murder and an attempted murder, both committed by Bracy, and that that evidence would be imputed to Collins. (TR. 1433). The trial court denied the request after assuring counsel that a limiting instruction would inform the jury that the evidence applied to Bracy only. (TR. 1438, 1496). This decision was not appealed.

Counsel for petitioner Bracy then sought a continuance in order to investigate the double murder and attempted murder charges pending against his client in Arizona. (TR. 1439). Counsel conceded that he had been served with the complete set of Arizona police reports at the outset of the trial. (TR. 1440-1443). The trial court noted that the jury was empaneled, and that counsel was in possession of the relevant materials. (TR. 1445, 1450).

The Illinois Supreme Court affirmed the trial court's refusal to grant a continuance prior to the commencement of the sentencing hearing. *Collins*, 106 Ill. 2d at 281, 478 N.E.2d at 286. The court noted that Bracy had subsequently been convicted of the Arizona crimes. *Id.* Consequently, the court held:

> Since the purpose of the continuance would have been to allow Bracey's [*sic*] counsel to gather evidence to show that Bracey [*sic*] had not committed the Arizona crimes, we fail to see how he is now prejudiced. If we were to find the denial of the continuance to have been improper and remand for a new sentencing hearing, the State would then introduce Bracey's [*sic*] Arizona convictions into evidence, thus raising an even stronger inference that Bracey [*sic*] committed the Arizona crimes. We do not feel that the denial of the continuance was in error.

Id. at 286-287.

SUMMARY OF ARGUMENT

Rule 6 (a) of the Federal Rules Governing Section 2254 Cases entitles parties to invoke processes of discovery "for good cause shown." Given the extraordinary remedy that habeas corpus provides, with the potential to upset presumptively final and correct state court judgments, this standard must be construed strictly, and be interpreted so as to require a habeas petitioner to first establish a *prima facie* case for relief. This standard would respect doctrines of comity and finality, and prevent the transmutation of an extraordinary remedy into a routine ladder of review. Requiring a threshold showing of some evidence tending to show the existence of the essential elements of the petitioner's constitutional claim before

ordering discovery adequately balances both the State's interests as well as the state prisoner's interest in avoiding illegal confinement.

In the instant case, the petitioner clearly failed to establish a *prima facie* showing that he was denied his constitutional right to an impartial judge. Fairness under the Constitution requires the absence of actual bias in the trial of a case. Petitioner's allegation, however, is one based merely on an appearance of impropriety on the part of the judge presiding at his trial and sentencing hearing. Since there is no precedent from this Court requiring the invalidation of a conviction based on an appearance of impropriety alone, petitioner, in any event, cannot obtain habeas relief on such a basis given this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989). The same is true of a bright-line rule invalidating a judge's rulings in any case in which he is known not to have taken a bribe simply because he took bribes in other cases. Accordingly, since petitioner cannot establish a constitutional violation by showing merely an appearance of impropriety, he correspondingly could not make the showing necessary to obtain discovery in support of his due process claim by producing evidence of an untoward appearance only. Moreover, in point of fact, other than the undeniable and regrettable status of the judge himself, petitioner points to nothing that actually raises even an appearance of impropriety. He cites several examples of discretionary rulings that "potentially affected the outcome" of the case, (Pet. Br. at 5-6), but of those rulings that were even appealed in state court, the Illinois Supreme Court found no error.

For these reasons, the district court below did not abuse its discretion in denying petitioner's discovery motion. This Court should, therefore, affirm the decision of the United States Court of Appeals for the Seventh Circuit.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING A DISCOVERY MOTION ON THE PETITIONER'S CLAIM THAT HE WAS DENIED HIS RIGHT TO TRIAL BEFORE AN IMPARTIAL JUDGE BECAUSE HE FAILED TO ESTABLISH THE NECESSARY THRESHOLD SHOWING OF ACTUAL BIAS ON THE PART OF THE JUDGE PRESIDING AT HIS TRIAL AND SENTENCING HEARING.

Petitioner contends that this Court's decisions on judicial bias establish that "a possible temptation to the 'average man' is sufficient to establish a due process violation," and, "once a possible temptation is established by the evidence, prejudice is presumed." (Pet. Br. at 16). Petitioner correspondingly argues that he "made a preliminary showing that Judge Maloney was under a possible temptation to rule corruptly at the time of [his] trial," because the former judge had solicited and accepted bribes in other contemporaneous criminal cases, and, therefore, he was entitled to discovery to support his claim that he was denied the right to trial before a fair and impartial judge. (*Id.*) For reasons that follow, petitioner's position is untenable.

Rule 6(a) of the Federal Rules Governing Section 2254 Cases entitles parties to invoke processes of discovery "for good cause shown." The Rule affords the district court substantial discretion. *Lonchar v. Thomas*, ___ U.S. ___, 116 S.Ct. 1293, 1300, 134 L.Ed.2d 440, 452 (1996). In this particular case, where the petitioner must show that the district court below abused its discretion in denying his discovery motion, the wide discretion afforded district courts in ruling on discovery issues clearly operates in the respondent's favor. However, the virtual absolute discretion enjoyed by district courts on questions of discovery in habeas cases has resulted in a lack of uniformity throughout the federal system on the issue of entitlement to the privilege.[1]

The present uncertainty associated with discovery in § 2254 cases was presaged by Justice Harlan in his dissenting opinion in *Harris v. Nelson*, 394 U.S. 286 (1969), this Court's leading case on discovery in habeas cases. Justice Harlan wrote:

> It seems to me that in fairness both to habeas petitioners and to their adversaries, the discovery procedures which are available in such actions should be uniform throughout the federal system and not dependent upon the varying "discovery attitudes" of particular district judges. If discovery procedures are developed case by case, there will at the least be a

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[1] Until recently, the district court had also been afforded a substantial degree of discretion in determining whether to hold an evidentiary hearing in a § 2254 case. That changed on April 24, 1996 when President Clinton signed into law the Antiterrorism and Effective Death Penalty Act of 1996. Pub. L. 104-132, 110 Stat. 1214. Section 104 of the new statute establishes limitations on the district courts' authority to grant evidentiary hearings. Although the Act does not speak specifically to discovery, it may be argued that the new statute's limitation on evidentiary hearings and the development of new facts generally, necessarily restricts the district court's power to grant discovery. *See* Brief of *Amicus Curiae* of the State of California filed in support of respondent.

> very long period during which procedures will differ from district to district.

394 U.S. at 305-06 (Harlan, J., dissenting).

This Court's promulgation of the Rules Governing Section 2254 Cases in 1976 sought to impose uniformity in habeas corpus practice. Although after promulgation of the Rules, the district courts' unbridled discretion with respect to discovery was limited—to be exercised only upon a showing of "good cause"—the lack of adequate guidelines in determining entitlement to discovery in habeas cases persisted.

In now determining the correct legal approach to questions of entitlement to discovery in § 2254 cases, one must recall the significant language in the majority opinion in *Harris v. Nelson*. Although giving district court judges considerable discretion in fashioning discovery procedures in habeas cases, the majority made clear that in order for that authority to even be triggered, a district court must first be confronted by a habeas petition which establishes a *prima facie* case for relief. Justice Fortas, speaking for the majority, wrote:

> [W]e conclude that, in appropriate circumstances, a district court, confronted by a petition for habeas corpus *which establishes a prima facie case for relief* may use or authorize the use of suitable discovery procedures . . . to help the court to "dispose of the matter as law and justice require."

394 U.S. at 290 (emphasis supplied). The majority opinion then concluded:

> [W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, *be able to demonstrate that he is confined illegally and is therefore entitled to relief*, it

> is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry.

394 U.S. at 300 (emphasis supplied); *see also Ward v. Whitley*, 21 F.3d 1355, 1367 (5th Cir. 1994) (holding that Rule 6 does not authorize fishing expeditions and that " '[h]abeas corpus is not a general form of relief for those who seek to explore their case in search of its existence' ").

Requiring a claimant to establish a *prima facie* case for habeas relief, in order to obtain discovery in support of a particular constitutional claim, is consistent with this Court's approach to discovery under Federal Rule of Criminal Procedure 16 in cases raising selective-prosecution claims. In *United States v. Armstrong*, ___ U.S. ___, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996), the Court held that in order to make the requisite showing to establish entitlement to discovery in such a case, the moving party must produce "some evidence tending to show the existence" of the essential elements of the claim. 116 S.Ct. at 1488, 134 L.Ed.2d at 701. The Court reasoned that although subject to certain constitutional restraints, prosecutors have broad discretion in the enforcement of the criminal laws. Also noting that "courts are 'properly hesitant to examine the decision whether to prosecute,'" (citation omitted), the Court cited " '[t]he presumption of regularity [which] supports' prosecutorial decisions. 116 S.Ct. at 1486, 134 L.Ed.2d. at 698. The Court made clear that 'in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties.'" *Id.* The Court concluded that "discovery thus imposes many of the costs present when the Government must respond to a *prima facie* case of selective prosecution" and, therefore, "[t]he jus-

tifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim." 116 S.Ct. at 1488, 134 L.Ed.2d at 701. The Court's holding makes perfect sense. By requiring a significant threshold showing in order to obtain discovery on a claim of selective prosecution, courts avoid unwarranted and highly intrusive inquiries into a "'special province' of the Executive." 116 S.Ct. at 1486, 134 L.Ed. 2d at 698.

Important concerns, flowing from the significant costs of federal habeas corpus review, are implicated as well when § 2254 review is sought by a state prisoner. "To begin with, the writ strikes at finality." *McCleskey v. Zant*, 499 U.S. 467, 491 (1991). "One of the law's very objects is the finality of its judgments. Neither innocence nor just punishment can be vindicated until the final judgment is known." *Id.* "'Without finality, the criminal law is deprived of much of its deterrent effect.'" *Id.* (*quoting Teague v. Lane*, 489 U.S. 288, 309 (1989)). "And when a habeas petitioner succeeds in obtaining a new trial, the 'erosion of memory and dispersion of witnesses that occur with the passage of time,' prejudice the government and diminish the chances of a reliable criminal adjudication." *Id.* (*quoting Kuhlmann v. Wilson*, 477 U.S. 436, 453 (1986)); *see also Teague v. Lane*, 489 U.S. at 308-309; *Murray v. Carrier*, 477 U.S. 478, 487 (1986); *Reed v. Ross*, 468 U.S. 1, 10 (1984); *Engle v. Isaac*, 456 U.S. 107, 127 (1982) (all reconfirming the importance of finality).

To be sure, "[f]inality has special importance in the context of a federal attack on a state conviction." *McCleskey*, 499 U.S. at 491. Just as a selective-prosecution claim involves judicial intrusion into an area that the Constitution reserves to the Executive Branch, reexamination of state convictions on federal habeas intrudes on "'both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.'" *Id.* (*quoting Murray v. Carrier*, 477 U.S. at 487). "Our federal system recognizes the independent power of a State to articulate societal norms through criminal law, but the power of a State to pass laws means little if the State cannot enforce them." *Id.*

"Habeas review extracts further costs." *McCleskey*, 499 U.S. at 491. "Federal collateral litigation places a heavy burden on scarce federal judicial resources, and threatens the capacity of the system to resolve primary disputes." *Id.* "Finally, habeas corpus review may give litigants incentives to withhold claims for manipulative purposes and may establish disincentives to present claims when evidence is fresh." *Id.*; *see also Keeney v. Tamayo-Reyes*, 504 U.S. 1, 9 (1992) ("[t]he state court is the appropriate forum for resolution of factual issues in the first instance, and creating incentives for the deferral of factfinding to later federal-court proceedings can only degrade the accuracy and efficiency of judicial proceedings.").

The same considerations that require a rigorous standard for discovery in aid of a selective-prosecution claim mandate a strict construction of the "good cause shown" language in Rule 6(a). In the context of habeas litigation, which involves the collateral attack of a state judgment presumed correct,[2] and which extracts significant costs

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[2] For a discussion of the distinctions between the burden of proof normally associated with criminal prosecutions and the standards of review reflecting the degree of deference a re-

(continued...)

as respondent has noted above, an in-depth reexamination of the state judgment should not even begin unless there is a substantial and concrete basis for suspecting that the petitioner is in fact being confined illegally. Respondent contends that requiring a threshold showing of some evidence tending to show the existence of the essential elements of the petitioner's constitutional claim, before ordering discovery, adequately balances the State's aforementioned interests as well as the state prisoner's interest in avoiding illegal confinement. Such a threshold showing would in turn curtail the frequent requests to take depositions and for discovery of documents outside of the record which presently accompany many habeas petitions, especially in capital cases. A less strict required showing, however, risks transforming habeas corpus review—an extraordinary remedy—into yet another routine ladder of review. That prospect is unacceptable, imposing as it would additional and onerous burdens on the States which are unlikely to result in any meaningful increase in the quality of review afforded habeas petitioners. A less strict required showing is also at direct odds with the intent of Congress to limit federal habeas corpus review which is evidenced by the Anti-terrorism and Effective Death Penalty Act of 1996. *See* Brief of *Amicus Curiae* of the State of California filed in support of respondent.

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[2] (...continued)
viewing court must afford with respect to the proceedings in the trial court, *see generally* Sullivan, *The "Burden of Proof in Federal Habeas Litigation*, 26 *Mem. St. U. L. Rev.* 205, 229-232 (1995).

The question in this case thus becomes: what evidence constitutes a *prima facie* case of the violation of the constitutional right to an impartial judge? As respondent noted above, petitioner asserts that "a possible temptation to the 'average man' is sufficient to establish a due process violation" and, "once a possible temptation is established by the evidence, prejudice is presumed." (Pet. Br. at 16). Petitioner's preposed standard, based as it is on speculation and conjecture, is simply untenable.

Petitioner's allegation of the violation of his right to due process is one based merely on an "appearance of impropriety" by the judge presiding at his trial and sentencing hearing. Affirming the en banc Court of Appeals' prior decision in *Del Vecchio v. Illinois Department of Corrections*, 31 F.3d 1363 (7th Cir. 1994) (en banc), *cert. denied*, 115 S.Ct. 1404 (1995), the majority of the three-judge panel below rejected the notion that an "appearance of impropriety" on the part of the presiding judge means that the conviction in question violates the Due Process Clause. As Chief Judge Posner wrote in the decision below, "[t]he fundamental reason that an appearance of impropriety is not alone enough to require a new trial is that it provides only a weak basis for supposing the original trial an unreliable test of the issues presented for decision in it. The fact that Maloney had an incentive to favor the prosecution in cases in which he was not bribed does not mean that he *did* favor the prosecution in such cases more than he would have done anyway." (J.A. 78) (emphasis supplied).

Indeed, an "appearance of impropriety" alone has never led this Court to find that a party did not receive due process of law:

None of [the Supreme] Court's constitutional decisions . . . establishes that an "appearance" problem—as opposed to actual bias—invalidates a judgment. To the contrary, the theme of the cases is exactly the common law rule: a judge with a financial interest in the outcome of the case may not sit. *E.g.*, *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *Ward v. Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 2d 749 (1927).

* * *

Cases sometimes treated as examples of "appearance" problems actually have different emphases. For example, *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499, 27 L.Ed.2d 532 (1971), held that a judge should not preside in a case in which he was the *victim* of a crime. The contemptuous remarks had been directed to the judge, and although historical practice would have allowed the judge to mete out summary punishment, it did not allow the judge to preside at a later trial. *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955), dealt with a combination of prosecutorial and judical functions that left the judge not only confused about his role but also in possession of evidence he should not have known. *See Withrow v. Larkin*, 421 U.S. 35, 53, 95 S.Ct. 1456, 1467, 43 L.Ed.2d 712 (1975). Thus, *Murchison* holds that the due process claue requires a trial to be limited to evidence heard in court, not that the Constitution precludes adjudication whenever the judge appears to have prejudged matters.

Del Vecchio, 31 F.3d at 1391, 1392 (Easterbrook, J., concurring).

"[M]ost matters relating to judicial disqualification [do] not rise to a constitutional level." *FTC v Cement Institute*, 333 U.S. 683, 702 (1948). Moreover, historically, "[r]equired judicial recusal for bias did not exist in England at the time of Blackstone." *Litkey v. United States*, 510 U.S. 540, 543 (1994). "The due process clauses come from English jurisprudence, which had a simple rule: 'a judge was disqualified for direct pecuniary interest and for nothing else.'" *Del Vecchio*, 31 F.3d at 1390 (Easterbrook, J., concurring) (*quoting* John P. Frank, *Disqualification of Judges*, 56 *Yale L.J.* 605, 609 (1947)). "The United States took over that tradition, and through the nineteenth century judges saw no difficulty in sitting when their relatives were parties (or lawyers), or in hearing appeals from their own decisions. See G. Edward White, III, *History of the Supreme Court of the United States: The Marshall Court and Cultural Change, 1815-35* 181-200 (1988); David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years* 76 (1985); Frank, 56 *Yale L.J.* at 615-18." *Id.*

Since there is no precedent from this Court requiring the invalidation of a conviction based on an "appearance of impropriety" alone, respondent further notes that petitioner is unable to demonstrate that he would be entitled to habeas relief on such a basis, given this Court's decision in *Teague v. Lane*, 489 U.S. 288 (1989), which disapproved the use of novel grounds to grant relief on an application for habeas corpus. Moreover, as pointed out in the majority opinion below, the same is true of any type of proposed bright-line rule "invalidating a judge's rulings in a case in which he is known not to have taken a bribe, simply because he took bribes in other cases." (J.A. 80).

Even if it could be gleaned from this Court's constitutional jurisprudence that in a very small number of cases, the possible temptation to engage in biased behavior is so severe that an actual, substantial incentive to be biased might be presumed, as Chief Judge Posner cautioned in the decision below, such an "automatic rule must be interpreted circumspectly, with due recognition of the cost to society of overturning the convictions of the guilty[3] in order to vindicate an abstract interest in procedural fairness." (J.A. 78-79). The Chief Judge reasoned:

> The fact that the people for obvious practical reasons do not have judicially enforceable rights to the protection of the criminal laws (though they do have judicially enforceable rights against discriminatory withdrawal of that protection) does not warrant a court in disregarding their interests when the court is formulating rules of constitutional law. Accepting Collins's contention would require a new trial in *every* case, jury and nonjury, capital and noncapital, in which a judge later found to be corrupt had presided and the defendant had been convicted, even though the judge had not been bribed by the prosecutor. . . . *Any* judge who is on the take will have an incentive to adopt Judge Maloney's alleged strategy and thus always do his best (or worst) to see to it that a defendant who does not bribe him is convicted. A principled acceptance of Collins's argument would thus require the invalidating of tens of thousands of civil and criminal judgments, since Judge Maloney alone presided over

[3] As the majority decision accurately reflected, "[t]he evidence of guilt presented at trial was compelling . . . . [There is] no basis for doubting the guilt of either Bracy or Collins." (J.A. 75).

> some 6,000 cases during the course of his judicial career and he is only one of eighteen Illinois judges who have been convicted of accepting bribes.

(J.A. 79) (emphasis in original).

In connection with this argument, respondent stresses, as did the majority below, that they in no way attempt to minimize the evils of judicial corruption. But as noted in the Brief *Amicus Curiae* of Concerned Illinois Lawyers and Law Professors in Support of Petitioner, much has been done to combat the erosion of public confidence in the Illinois court system which has resulted from the judicial corruption uncovered in Cook County, (Br. *Amicus Curiae* at 17); and rightly so, the judges themselves and legislators alike are the ones who must be held accountable when there exists a public perception that the quality of justice in a particular venue has deteriorated. But as the majority opinion below also suggests, the answer to restoring the public's faith in the integrity of the justice system does not lie in ignoring the obvious cost to society of reversing the convictions of guilty criminal offenders such as petitioner in order to vindicate a theoretical interest in procedural fairness.

In turning to the question of whether the petitioner made the showing necessary to obtain discovery in support of his claim that he was denied his right to an impartial judge, respondent echoes the majority below who noted that a presumption, such as petitioner proposes, that "a judge who accepts bribes in some cases is corrupt in all is not a sufficiently compelling empirical proposition" to treat this case as if Judge Maloney had in fact taken a bribe from the prosecution to convict. (J.A. 82). When the presumption is thus properly rejected, as was done below, the case is one "in which there is merely an

appearance of impropriety in the judge's presiding, and an appearance of impropriety does not constitute a denial of due process." (J.A. 82). It necessarily follows then that because petitioner cannot establish a constitutional violation by showing merely an "appearance of impropriety," he correspondingly was unable to make the showing necessary to obtain discovery in support of his due process claim simply by producing some evidence of a questionable appearance, regardless of how much evidence he mustered in support of that theory.

If, on the other hand, petitioner had made a credible showing that Judge Maloney exhibited some actual bias in conducting his trial and sentencing hearing, he would have been entitled to discovery in support of his due process claim. *See Del Vecchio v. Illinois Department of Corrections*, 31 F.3d at 1379 (*quoting Murchison*, 349 U.S. at 136) ("'Fairness of course requires the absence of actual bias in the trial of a case.'"); *cf. Cuyler v. Sullivan*, 446 U.S. 335 (1980) (to prove *per se* ineffective assistance of counsel due to conflict of interest, petitioner must show evidence of an actual conflict). Although petitioner has never come right out and argued that Maloney exhibited actual bias against him, he has and does complain about some of the judge's rulings which went against him and his co-defendant, implying that the adverse rulings were the consequence of the judge taking bribes in other cases. But as the majority of the three-judge panel below found after first stressing that this was a jury trial and sentencing—the outcome of which the presiding judge has less responsibility for than when the proceedings are held before a judge alone—"they [Bracy and Collins] have not shown that there were so few rulings in their favor that the judge *must* have been

biased in favor of the government." (J.A. at 82) (emphasis in original). And in fact, "[t]his may be a case in which *any* judge would have ruled in favor of the government in the instances of which the defendants complain." (J.A. at 83-84) (emphasis in original). Indeed, in concluding that petitioner had not shown good cause to justify further discovery, the district court judge below noted as well that "they [Bracy and Collins] do not point to any particular adverse ruling that would have been favorable to them before another judge." *United States ex rel. Collins v. Welborn*, 868 F.Supp. 950, 991 (N.D. Ill. 1994).

To be sure, petitioner stops short of claiming that the judge's discretionary rulings were wrongly decided which, in the first instance, explains why many of the rulings now complained of were never even appealed. Moreover, as noted by the majority below, those that were raised on appeal were later ratified by the Illinois Supreme Court. (J.A. 82).

Additionally, when examining these rulings specifically, it is clear that they provide no evidence of actual bias on the part of Judge Maloney, since they are not only within the proper boundaries of judicial discretion, but are in fact correct. For example, both petitioner and the dissent below point to the trial court's denial of co-defendant Roger Collins's motion to suppress evidence as one example of how Maloney could improperly shape the outcome of the trial. (Pet. Br. at 5; (J.A. 111)). An independent examination of this issue, however, reveals that in denying the motion to suppress, the trial court made a legally defensible decision.

Specifically, co-defendant Collins claimed that certain photographs taken by police from a trash bag on an open

second-floor porch of the apartment building where he lived violated his Fourth Amendment rights against unreasonable search and seizure. At the hearing on Collins's motion to suppress, he testified that the photographs were taken from a suitcase in his closet inside the apartment. (TR 308-309). He claimed that there were no trash receptacles on the second-floor porch of his building and that trash had to be carried by the tenants to a ground floor receptacle in the rear of the building. (TR 309-311). Officer Michael Hoke of the Chicago Police Department refuted this testimony, stating that on February 5, 1981, he arrested Collins on the basis of an outstanding parole violation warrant. (TR 365-367). Following the February 21, 1981 arrest of petitioner and Murray Hooper, Hoke returned to Collins's apartment building to speak to neighbors. (TR 368-369). Receiving no answer at the door of either second-floor apartment at the front of the building, he and his companions went to the rear of the building and ascended the rear stairs to an open, wooden, second-floor porch. (TR 369). On that porch, near the rear door of Collins's apartment, they discovered a plastic trash bag. Examination of the contents of this bag revealed five photographs and a piece of paper, all of which the officers seized. (TR 370-374). One of these photographs was later admitted at trial as it showed Collins wearing a broad-brimmed hat similar to that described by witnesses. (TR 423, 500, 734). In rebuttal, Collins called the building's janitor who stated that there were no garbage cans on the building's rear porches, and that it was the duty of tenants to take the trash out to the alley. (TR 385-388). This witness admitted, however, that from time to time tenants did leave bags of trash on the rear porches, although they were not supposed to do so. (TR 387, 391).

At the conclusion of the hearing, Judge Maloney rejected the version of the search presented by Collins and found, instead, Officer Hoke to be the more credible witness. (TR 397-398). He further found that by leaving the bag on the rear porch, Collins had abandoned any reasonable expectation of privacy in it and the officers had committed no violations of Collins's rights by seizing its contents. (TR 398).

The propriety of this ruling is born out by the record. Collins's own witness bolstered Hoke's testimony by stating that tenants were known to leave trash on the porch instead of transporting it to the dumpster on the ground floor. Maloney's credibility determination, therefore, raises no suspicions concerning his impartiality.

Nor does Maloney's legal ruling in connection with this issue raise any red flags. When property has been abandoned, a defendant no longer has any reasonable expectation of privacy in it and cannot complain that its seizure represents a violation of his rights under the Fourth Amendment. *Abel v. United States*, 362 U.S. 217 (1960); *Katz v. United States*, 389 U.S. 347 (1967).

On direct appeal, the Illinois Supreme Court considered the claim and affirmed Maloney's ruling, agreeing that Collins had no reasonable expectation of privacy in the contents of a garbage bag placed in an open, accessible, common area of the apartment building. *People v. Collins*, 106 Ill. 2d at 265-266, 478 N.E.2d at 278-279.

In connection with the sentencing phase of his trial, petitioner complains that the trial judge declined to grant his co-defendant's request for a separate penalty hearing. (Pet. Br. at 5). Counsel for Collins made the request notwithstanding his assertion at the time that

"there is no conflict here, and there wasn't any conflict *per se* between the two defendants[.]" (TR 1432). Counsel based his request solely on the fear that evidence of the unrelated Arizona crimes committed by petitioner Bracy would be imputed to Collins as well. (TR 1433). The trial court denied the request after assuring counsel that a limiting instruction would inform the jury that the aggravating evidence applied to Bracy only. (TR 1438, 1496). This decision was not appealed.

Clearly, if a claim is not deemed worthy of inclusion in a direct appeal, one obvious explanation for such a strategy is that the claim lacks merit. Moreover, a separate sentencing hearing in this case would have inured only to Collins's benefit, not petitioner's, and thus the judge's denial of the motion does not tend to show actual bias against petitioner Bracy in any event.

Petitioner also implies that his attorney's unsuccessful attempt to obtain a continuance prior to the sentencing hearing demonstrates bias. (Pet. Brief at 5). The continuance was sought in order to investigate the double murder and attempted murder charges pending against petitioner in Arizona. (TR 1439). Counsel conceded that he had been served with the complete set of Arizona police reports at the outset of the Illinois trial. (TR 1440-1443). The trial court refused the request, noting that the jury was empaneled and that counsel was in possession of the relevant materials. (TR 1445-1450). The Illinois Supreme Court affirmed this ruling, also noting that Bracy had in fact subsequently been convicted of the Arizona crimes. *People v. Collins*, 106 Ill. 2d at 281, 478 N.E.2d at 286. That court held:

> Since the purpose of the continuance would have been to allow Bracey's [sic] counsel to gather evidence to show that Bracey [sic] had not committed the Arizona crimes, we fail to see how he is now prejudiced. If we were to find the denial of the continuance to have been improper and remand for a new sentencing hearing, the State would then introduce Bracey's [sic] Arizona convictions into evidence, thus raising an even stronger inference that Bracey [sic] committed the Arizona crimes. We do not feel the denial of the continuance was in error.

Id. at 281; 286-287.

Although the fact that petitioner was not prejudiced by the unfavorable ruling regarding the continuance is irrelevant to whether the ruling shows actual bias, the fact that the ruling is legally defensible is pertinent to the bias issue. And as the majority of the three-judge panel below concluded, "[i]t [the continuance] was properly denied." (J.A. 93). The majority noted that in Illinois, a capital defendant is ordinarily sentenced by the same jury that convicted him. "Since it is the same jury, the sentencing hearing perforce follows immediately upon the trial, as it also does when the jury is waived. Defense lawyers know all this, and therefore if they wish to gather evidence of mitigating circumstances they must do so before the trial ends, because they will have no time to do so after the trial ends." (J.A. 93-94).

Petitioner further points to the fact that Judge Maloney admitted evidence in aggravation at sentencing of unadjudicated murders and an attempted murder in Arizona. (Pet. Br. at 5). The Illinois Supreme Court, however, found no abuse of discretion, noting that "[w]e have held in the past that the jury at the second stage of the death sentencing hearing may consider any evidence which is shown by reliable testimony and is relevant in

aggravation or mitigation." The state high court then concluded that unadjudicated criminal charges are included in this type of admissible aggravating evidence. *People v. Collins*, 106 Ill. 2d at 282, 478 N.E.2d at 287. This is yet another example of a discretionary ruling that is irrefutably legally defensible. The evidence was both reliable and relevant—reliable, as it was testified to by the sole survivor of Bracy's Arizona murder spree, and relevant since it conveyed to the jury petitioner's status as an unrehabilitated recidivist. Moreover, petitioner was in fact later convicted and sentenced to death for his Arizona crimes. (J.A. 94). In short, this evidence was admissible under Illinois law and no improper motive can be ascribed to its admission.

As his last complaint with respect to Judge Maloney's rulings, petitioner echoes the dissent of Judge Rovner in noting that the trial court may have influenced the jury by permitting the prosecution to engage in improper argument. (Pet. Br. at 5-6, *citing* J.A. 111). The Illinois Supreme Court found no fault with the prosecution's argument, however, concluding that defense counsel had invited the comments by virtue of his own argument and thus could not be heard to complain. *Collins*, 106 Ill. 2d at 283-84, 478 N.E.2d at 287. Other portions of the State's argument had not been objected to during the trial, and were thus deemed waived on appeal. *Id.*

In further support of his argument that he in fact made an adequate preliminary showing of a violation of his due process rights, thereby entitling him to discovery, petitioner points to the transcript of Maloney's federal trial and argues, for the first time in any court, that it too yields evidence of actual bias on the part of the former judge. As the dissent below noted as well, petitioner urges that the *Maloney* transcript shows that, according to the testimony of William Swano, a witness who cooperated with the Government, "on at least one occasion Judge Maloney rendered a guilty verdict in a weak prosecution case as a means of advertising his desire to obtain bribes." (Pet. Br. at 17). What petitioner fails to also point out, however, is that in the *Davis* prosecution, to which he is referring, William Swano was so confident of obtaining an acquittal that he neglected to proffer the usual payment to Judge Maloney and the judge subsequently convicted Swano's client after a bench trial—an action construed by Swano as a "lesson." (J.A. 99-100). Respondent asserts, therefore, that the Swano story, as odious as it may be, is of minimal significance in showing that Maloney was actually biased against petitioner in this case. As even Judge Rovner's dissent concedes, Maloney had not sought a bribe from the defense attorneys in this case, and there is no suggestion that they had ever previously bribed Maloney in connection with prior cases. Accordingly, Maloney had no reason to expect a bribe from petitioner's attorneys and thus would have had no reason to feel aggrieved by the lack of one.

In sum, petitioner was unable to make a threshold showing consisting of some evidence tending to show the existence of the essential elements of his constitutional claim. Such a showing would have required some evidence that Judge Maloney was actually biased against petitioner. Accordingly, the district court's denial of petitioner's discovery motion did not amount to an abuse of discretion.

Moreover, it is also significant to note, as the majority did below, that petitioner's first and third requests for

discovery materials, *i.e.*, the sample of Judge Maloney's cases in which he did not take bribes, as well as any evidence the federal Government might have obtained in its prosecution of Maloney indicating that he was in fact biased in favor of the prosecution in cases in which he was not bribed, did not even require formal discovery since all of Maloney's cases and the transcript of his own racketeering trial were matters of public record.[4] And, as for the petitioner's request to depose some of the persons and witnesses who were most intimately associated with Judge Maloney, the majority properly characterized this proposal as nothing more than a "fishing expedition," noting that "[e]ven if the expedition discovered that Maloney did lean over backwards in favor of the prosecution in cases in which he was not bribed, in order to conceal his taking of bribes in other cases, it would not show that he followed the practice in *this* case." (J.A. 83) (emphasis supplied).

[4] The majority noted that although the transcript from Maloney's racketeering trial had previously been sealed, "it was unsealed in August of 1994, so that the petitioner's lawyers have had a year and a half to look for clues in that record." (J.A. 83).

CONCLUSION

For all of the foregoing reasons, the respondent, Richard B. Gramley, respectfully requests that the decision of the United States Court of Appeals for the Seventh Circuit be affirmed.

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FOR ARGUMENT

(7)

No. 96-6133

In The

Supreme Court of the United States

October Term, 1996

WILLIAM BRACY,

Petitioner,

vs.

RICHARD GRAMLEY, Warden
Pontiac Correctional Center,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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STATUTES

I.

SUMMARY OF ARGUMENT

Respondent is incorrect in claiming that Federal Habeas Rule 6(a), as it has been interpreted by this Court, requires the same showing which is needed to obtain an evidentiary hearing. Respondent incorrectly suggests that the standard that must be met in order to establish a due process claim based upon judicial bias is that there must be a showing of actual bias in a particular case. According to well established case law, the correct standard for evaluating a judicial bias claim is whether there is a reasonable likelihood that the biasing influence was a component of the decision making of the court. Respondent's concern that a decision in favor of Petitioner will have a disruptive impact on the states' legitimate interests in the finality of judgments and will place an undue burden on the states in other cases is based upon unfounded speculation, considering the unique circumstances of this case and the limited nature of the question presented for review. Respondent has waived the *Teague* argument by not asserting it below. Assuming that it has not been waived, *Teague* is inapplicable because Petitioner is not claiming the benefit of a new rule. Furthermore, consideration of *Teague* is premature and should be held in abeyance pending completion of discovery. Respondent has waived the argument that newly enacted Title 28 United States Code § 2254(e)(2) governs this case by not raising it in its brief in opposition to the petition for a writ of certiorari and by not arguing it substantially in its brief on the merits. Assuming that the argument is not waived, § 2254(e)(2) doesn't apply to this case because it only extends to situations where a habeas petitioner

"failed" to develop the factual basis of the claim in state court. Petitioner did not "fail" to do anything because he tendered his due process claim to the Illinois Supreme Court, as soon as the factual basis of the claim became known to him, and the Illinois Supreme Court declined to consider it. Finally, application of § 2254(e)(2) to this case violates the presumption against retroactivity.

II.
ARGUMENT

Respondent argues incorrectly that in order to be entitled to discovery under Habeas Rule 6(a), a petitioner must demonstrate a prima facie claim for relief. In *Blackledge v. Allison*, 431 U.S 63, 81, 52 L. Ed. 2d 136, 97 S. Ct. 1621 (1977), this Court acknowledged that a District Court has discretion under Rule 6(a) to order discovery as a means of determining whether or not an evidentiary hearing is necessary. Under the law which is applicable to this case, an evidentiary hearing is required in Federal Habeas Corpus proceedings if there is a factual dispute material to the claim, and Petitioner has not had a full and fair opportunity to develop the facts in state court. *See, Townsend v. Sain*, 372 U.S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963) and *Keeney v. Tamayo Reyes*, 504 U.S. 1, 118 L. Ed. 2d 318, 112 S. Ct. 1715 (1992). Respondent seems to be arguing that the showing required for discovery is the same as that which is necessary to establish the right to an evidentiary hearing. This is contrary to the holding in *Blackledge*.

Respondent argues incorrectly that in order to be entitled to relief on a judicial bias claim, a petitioner must

demonstrate actual bias in a particular case.[1] This position is contrary to the previous decisions of this Court. In *Mayberry v. Pennsylvania*, 400 U.S. 455, 27 L. Ed. 2d 532, 91 S. Ct. 499 (1971), this Court held that due process requires a criminal contempt trial before a different judge in the event that a party makes direct personal attack on the judge, without reference to actual bias on the part of the judge who was the subject of the attack. In *Ward v. Monroeville*, 409 U.S. 57, 34 L. Ed. 2d 267, 93 S. Ct. 80 (1972), this Court held that due process required the disqualification of a municipal judge, where the municipality derived significant revenue from fines imposed in the event of ordinance violations, again without reference to actual bias. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S 813, 89 L. Ed. 2d 823, 106 S. Ct. 1580 (1985), this Court held that due process required the disqualification of a State Supreme Court judge who also was the plaintiff in another lawsuit which dealt with the same legal question that in his capacity as judge he was called upon to decide. In *Aetna Life*, this Court specifically ruled that a showing of actual bias was unnecessary, stating:

> We make clear that we are not required to decide whether in fact Justice Embry was influenced, but only whether sitting on the case then before the Supreme Court of Alabama "would

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[1] The 7th Circuit in this case applied the same incorrect legal standard. While denial of discovery under Habeas Rule 6(a) may be reviewed for abuse of discretion, as argued by Respondent, it is an abuse of discretion to apply incorrect legal principles. *Hunt v. National Broadcasting, Inc.*, 872 F.2d 289, 292 (9th Cir. 1989).

> offer a possible temptation to the average- . . . judge . . . to lead him not to hold the balance nice, clear, and true." Ward 409 U.S., at 60 (quoting Tumey v. Ohio, *supra*, at 532).

475 U.S. at 825.

The above cited cases clearly establish that a showing of actual bias in the particular case is not a necessary element of a due process claim, and that a claim is established if there is a reasonable likelihood that the biasing influence was a component of the judge's decision making.

Based on an erroneous assumption that actual bias must be shown, Respondent endeavors to establish that Judge Maloney's many adverse rulings at Petitioner's trial and sentencing hearing were either correct or at least "legally defensible". *See* Respondent's Brief 17-22. Petitioner maintains that the critical inquiry under the Due Process Clause is whether discretionary decisions that potentially affected the outcome of the case were untainted by an apparently corrupt motive, not whether such decisions might have otherwise fallen within the ambit of judicial discretion or were legally correct. Petitioner asserts that it is impossible to make this determination in the absence of further inquiry.

For example, an important discretionary ruling that gives cause for concern is the manner in which Judge Maloney dealt with Petitioner's request for a continuance of the sentencing hearing. Petitioner's trial in state court began on July 20, 1981. TR 100. The jury returned guilty verdicts on July 29, 1981. TR 1420-1424. After the jury returned its verdicts, the Assistant State's Attorney filed a

motion for a death penalty hearing pursuant to the Illinois Statute. TR 1424. On July 30, 1981 after defense counsel moved unsuccessfully for a continuance, and objected unsuccessfully to introduction of the evidence of the Arizona homicides, the jury began hearing testimony in the penalty phase. TR 1456.

Assuming that the police reports regarding the Arizona homicides were delivered to Petitioner's trial counsel at the commencement of the guilt phase of the Illinois case, as Respondent suggests, he would have had less than two full weeks to attempt to prepare a defense to a second homicide charge, while in the midst of representing Petitioner in the guilt phase.[2] Although it may not have been an abuse of discretion on the part of Judge Maloney to deny Petitioner's request for a continuance of the sentencing hearing, other reasonable and fair minded jurists might have exercised their discretion differently. They might have granted a brief postponement of the penalty phase as requested by Petitioner's trial counsel, or they might have decided to exclude the evidence of the Arizona homicides based upon insufficient notice to the defense. This was a discretionary ruling which was likely to have affected the sentencing decision made by the jury. In the absence of more information, it is impossible to say with any degree of certainty that Judge Maloney made

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[2] It is apparent that trial counsel was unprepared to go forward in the penalty phase of the Illinois trial. He rested at the conclusion of the State's case, presenting no affirmative evidence to controvert aggravating factors or to mitigate the severity of the sentence. TR 1625-1628.

this decision independently of a corrupt motive to maintain a false facade as a "law and order" judge.

Another questionable discretionary decision was the selection of appointed counsel. Petitioner's trial counsel, who was appointed directly by Judge Maloney, (Supplemental Transcript 46, 47), conceded his lack of experience in handling capital cases when he told the jury in the final argument in the penalty phase that he never before faced the necessity of pleading for someone's life after a guilty verdict. TR 1637, 1638. While the selection of indigent defense counsel is often a matter committed to the trial court's discretion, a reasonable and fair minded jurist might well have decided to appoint someone with more experience in defending capital cases than Mr. MacDonald. Again, given the state of this record, it is impossible to say with confidence that Judge Maloney did not deliberately select a less experienced lawyer to represent Petitioner due to a corrupt motive, such as a desire to insure a guilty verdict and a death sentence in a high profile case.[3]

Respondent argues that the significant costs associated with federal habeas review mandate strict construction of the "good cause" standard under Federal Habeas Rule 6(a). *See,* Respondent's Brief at 8-10. According to Respondent, these costs might include the possibility that habeas petitioners will deliberately withhold their claims

[3] As was pointed out in the amicus brief submitted by Concerned Illinois Lawyers, former Judge Maloney boasted of the conviction and sentence of Bracy and Collins at the time of his own sentencing. *See,* Amicus Brief of Concerned Illinois Lawyers at 11.

from resolution by the state courts. *Id.* at 9. Respondent also fears that federal district judges will be more inclined in the future to grant discovery requests, thus imposing onerous burdens on the states and disrupting their legitimate interests in the finality of judgments. Respondent's concerns about the ramifications of a decision favoring Petitioner's discovery request are unjustified. This case comes before the Court in a unique posture and a decision for Petitioner is unlikely to have much of an impact on other cases.

First of all, this is not a case where Petitioner could have submitted his claim to the state court but deliberately failed to do so. The facts upon which Petitioner rests his claim were not known to him and could not have been known, until late in the state post conviction proceedings, when he did in fact present his claim to the state court. Secondly, the limited nature of the question presented for review makes it unlikely that other cases will be affected. Finally, there is a unique public policy consideration favoring Petitioner's discovery request, which is unlikely to be present in many other cases, namely the need in this capital case for there to be a full airing of the facts in one of the most sordid instances of judicial corruption in American jurisprudence.[4]

Respondent also expresses the concern that in the event that this Court rules in favor of Petitioner, numerous convictions may be vulnerable to attack. *See,*

[4] In the absence of discovery, the full extent of Judge Maloney's corruption and the degree to which it perverted the reliability of the fact finding process in Petitioner's case will never be known.

Respondent's brief at 14. However, this case is special among the Judge Maloney cases in that it was a high profile capital prosecution sandwiched between two murder bribes, (JA 27, 36, 37), and the surrounding circumstances may have provided Judge Maloney with additional incentive to showcase his alliance with the State. In any event, Respondent's concern about the impact that this case may have upon other cases involving judicial corruption is premature. Questions as to the remedy that a court may wish to fashion in the event that a due process violation is discovered cannot be adequately addressed until there has been full disclosure of the facts.

Respondent suggests that Petitioner is advocating application of a new rule to a case pending on collateral review, which is forbidden by *Teague v. Lane*, 489 U.S. 288, 103 L. Ed. 2d 334, 109 S. Ct. 1060 (1989). Respondent never argued *Teague* below, and therefor the argument is waived. *Air Courier Conf. v. Postal Workers*, 498 U.S. 517, 522, 112 L. Ed. 2d 1125, 111 S. Ct. 913 (1991). Although this Court has discretion to address the *Teague* claim sua sponte, *see*, *Caspari v. Bohlen*, 510 U.S. 383, 127 L. Ed. 2d 236, 114 S. Ct. 948 (1994), it should decline to do so. The main purpose of the *Teague* doctrine is to validate reasonable interpretations of existing precedents. *Stringer v. Black*, 503 U.S. 222, 237, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992). Since Petitioner was never able to submit this claim to the state court, the main rationale for applying *Teague* is inapplicable; the state is not in a position to claim it relied to its detriment on existing precedent.

Moreover, Respondent is incorrect in asserting that Petitioner is advocating application of a new rule. A case

announces a new rule if the result was not dictated by precedent existing at the time that the conviction became final. *Teague*, 489 U.S. 301. Here, Petitioner is not relying on a new rule but on *Tumey*, *Ward*, and *Mayberry v. Pennsylvania*, all of which were decided before Petitioner's conviction became final. Nor is Petitioner seeking application of a prior decision in a novel setting. *See*, *Stringer v. Black*, 503 U.S. 227. As was stated by Judge Rovner in her dissenting opinion in the Seventh Circuit:

> But surely common sense counts for something in the *Teague* analysis. The Greylord prosecutions had not yet taken place in 1981 when Bracy and Collins were tried, but the State of Illinois cannot claim to have been ignorant of the notion that bribery is illegal and that judges who accept bribes belong in prison not on the bench. There is, in short, nothing surprising about petitioners' claim.

Bracy v. Gramley, 81 F. 3d 684, 704 (7th Cir. 1996).

In any case, *Teague* is a rule of substantive law rather than procedure and it is premature to discuss it without full knowledge of the facts. In the absence of discovery, no one is in a position to know whether *Tumey* is being invoked in a novel setting or not. Any consideration of the *Teague* question in this case should therefor be deferred until after the completion of discovery.

Respondent does not argue but apparently relies on the amicus brief to suggest that Petitioner's opportunity to obtain an evidentiary hearing is precluded by newly enacted Title 28 United States Code § 2254(e)(2), and therefor Petitioner is not entitled to discovery. Since Respondent did not include it in its brief in opposition to

the petition for certiorari, and did not argue it substantially in its merits brief, the issue is waived. *Oklahoma City v. Tuttle*, 471 U.S. 808, 816, 85 L. Ed. 2d 791, 105 S. Ct. 2427 (1985); *Canton v. Harris*, 489 U.S. 378, 385, 103 L. Ed. 2d 412, 109 S. Ct. 1197 (1989); and *see*, Supreme Court Rule 15.2.[5] The provisions of the Antiterrorism and Effective Death Penalty Act ("ADEPA") do not affect the subject matter jurisdiction of the Court, and therefor the State's failure to raise the question constitutes waiver. *Emerson v. Gramley*, 91 F. 3d 898, 899 (7th Cir. 1996); *Huynh v. King*, 95 F. 3d 1052, 1055, n.2 (11th Cir. 1996).

Although the issue has been argued in the amicus brief, this Court may decline to consider it because it has not been raised by the parties. *United Parcel Service v. Mitchell*, 451 U.S. 56, 60, n. 2, 67 L. Ed. 2d 732, 101 S. Ct. 1559 (1981). This Court has expressed reluctance to consider arguments raised only in an amicus brief when the issue is one of first impression, involving interpretation of a federal statute, and the Department of Justice has declined to take a position. *Davis v. United States*, 512 U.S. 451, 129 L. Ed. 2d 362, 370, 114 S. Ct. 2350 (1994).

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[5] The Attorneys General are incorrect in their contention that the application of § 2254(e)(2) to this case is a subsidiary question fairly included in the question presented. A question is not "fairly included" if it is not essential to the analysis of the question presented. *See, Procunier v. Lavarette*, 434 U.S. 555, 560 n. 6, 55 L. Ed. 2d 24, 98 S. Ct. 855 (1978). A threshold inquiry that in no way depends on the merits of the case is not a subsidiary question. *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 31, 126 L. Ed. 2d 396, 114 S. Ct. 425 (1993). Including an issue in the briefs does not bring the question before the Court. *Id.* at n.5.

Assuming that this Court is inclined to address the issue, § 2254(e)(2), by its terms, does not apply to this case. The relevant portion of the statute provides:

> If the applicant *has failed to develop the factual basis of the claim* in state court proceedings, the court shall not hold an evidentiary hearing. . . .[6]

Petitioner did not "fail" to do anything. The District Court found that Petitioner attempted to bring the claim to the attention of the state court as soon as he became aware of its existence and the Illinois Supreme Court declined to consider it. *U.S. Ex Rel. Collins v. Wellborn*, 868 F. Supp. 950, 991 (N.D. Ill. 1995). Leaving aside the question of whether § 2254(e)(2) applies regardless of cause or fault, use of the phrase "failed to develop" implies inaction, and in this case Petitioner acted with diligence in tendering his claim of judicial bias to the state court.

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[6] In its entirety, § 2254(e)(2) provides:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –

(A) The claim relies on –

(i) a new rule of constitutional law, made retroactive to cases on collateral review by Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense . . .

The position taken by the Attorneys General in the amicus brief suggests a precedent that is both dangerous and ridiculously harsh. The District Court in this case also made a finding that the time within which Petitioner would have been able to secure relief under the Illinois Post Conviction Act had expired. *United States Ex Rel. Collins v. Wellborn*, 868 F. Supp. at 991. According to the Attorneys General, a state court may arbitrarily decline to hear a claim that goes to the heart of a defendant's right to a fair trial and a fair sentencing in a capital case, and the defendant may thereby be deprived of the right to develop the factual basis of the claim in any court, unless he can demonstrate actual innocence by clear and convincing evidence. According to the Attorneys General, Petitioner is deprived of any remedy, although he claims that the trial and sentencing hearing in his case were unreliable and unfair, simply because Judge Maloney was devious enough to conceal his corruption for a number of years after Petitioner's conviction became final.

If for no other reason than that the argument in the amicus brief fosters an unduly harsh and unjust result, this Court should decline to consider the applicability of § 2254(e)(2) to this case, when it is under no obligation to do so. Alternatively, this Court should construe the phrase "failed to develop" in § 2254(e)(2) to be inapplicable to situations where a habeas petitioner has diligently tendered the claim to the state court, the state court has declined to consider it, and there remains no opportunity to present the claim in state court. Such an interpretation is necessary if this Court wishes to avoid the impression that the Great Writ has been reduced to the status of a "rubber stamp".

Assuming for the sake of argument only that what transpired in Petitioner's case constitutes a "failure to develop", as that phrase is used in § 2254(e)(2), the statute doesn't apply to this case which was pending prior to the date of enactment. Application of § 2254(e)(2) to this case violates the presumption against retroactivity. In *Landgraf v. USI Film Products*, 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994), this Court stated:

> When a case implicates a federal statute enacted after the events in the suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course there is no need to resort to judicial default rules. When, however, the statute contains no express command, the court must determine whether the new statute would have retroactive effect, i.e., *whether it would impair rights a party possessed when he acted*, increase a parties liability for past conduct, or impose new duties with respect to transactions completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

114 S. Ct. 1504, (emphasis supplied).

At the time that the petition was filed and considered by the District Court, Petitioner had the right to an evidentiary hearing to develop his claim that he was deprived of a fair and reliable trial and capital sentencing as a result of judicial bias, assuming that he was not afforded an opportunity to do so in state court. Moreover, he was afforded this right regardless of his ability to demonstrate actual innocence by clear and convincing

evidence, as he would now be required to do under § 2254(e)(2)(B). Since the statute thus deprives Petitioner of a right he possessed at the time that he filed his petition, the presumption against retroactivity is invoked, and there is nothing in Section 104 of the Amendments to § 2254 to suggest that it was intended to apply to cases pending on the date of enactment.[7]

Respondent contends that much is being done to combat the erosion of public confidence in the Illinois court system. *See*, Respondent's brief at 15. However, that is small comfort to Petitioner who claims that he was deprived of fair and reliable trial and capital sentencing because he had a racketeer as a judge. Ultimately, even the State will benefit if we are allowed to learn how Judge Maloney's corruption affected his behavior in those cases in which he did not receive bribes. Either the state will be able to say with confidence that the corruption had no effect on the judgment, or at least that the full extent of the corruption finally became known and appropriate corrective measures were taken. Either way, the public and the judicial system will benefit from the result.

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[7] The fact that § 2254(e)(2) deals with a procedural rule doesn't affect the applicability of the presumption against retroactivity. This Court in *Landgraf* noted that, "the mere fact that a new rule is procedural does not mean it applies to every pending case", and "we do not restrict the presumption against statutory retroactivity to cases involving vested rights". 114 S. Ct. 1502, n.29.

III.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

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No. 96-6133

In the
Supreme Court of the United States
October Term, 1996

William Bracy,

Petitioner,

vs.

Richard B. Gramley, et al.,

Respondents.

On Writ of Certiorari To The United States
Court of Appeals for the Seventh Circuit

Brief *Amicus Curiae* of Concerned Illinois Lawyers and Law Professors in Support of Petitioner

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February 21, 1997

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

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STATEMENT OF INTEREST OF THE AMICI

The persons filing this amicus brief -- styled collectively as "Concerned Illinois Lawyers and Law Professors" -- are a diverse group of lawyers and law professors who practice and teach in Chicago, Illinois, and are committed to the honest administration of justice. One is a former Governor of the State of Illinois. Another is a retired Justice of the Illinois Supreme Court. Several have served in the federal or Illinois judiciary. Others have held positions of importance in local and state government. A number are former state or federal prosecutors. Some are distinguished academic lawyers. Others have risen in the practice of law. All are prominent members of the Chicago legal community.

In light of their different backgrounds, the amici have divergent views on the death penalty. Some support the institution of capital punishment. Others oppose it. Many of the amici have backgrounds in law enforcement. Others are defense oriented.

The *amici* share one common view, which prompts their joint involvement in this brief: the amici believe that the perpetration of judicial corruption, particularly in capital cases, is intolerable. The amici have witnessed at close range the erosion of public confidence that occurs when a community is faced with disclosures of official misconduct by its own elected judiciary. The *amici* believe that the restoration of lost public confidence is vital to the integrity of the criminal justice system, and particularly the capital process. And the *amici* are convinced that that restoration can only occur when there is a steadfast commitment to ensuring that the execution of a judicial order -- particularly an order that a criminal defendant be put to death --

must never be the product of judicial corruption.

The *amici* are:

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Kimball Anderson	Partner: Winston & Strawn
Fredrick H. Bates	Partner: Albert Bates Whitehead & McGaugh; President of the Cook County Bar Association
Robert W. Bennett	Professor of Law and former Dean, Northwestern University School of Law
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[1] Law School, law firm and other institutional affiliations are included only for purposes of identification. The views expressed in this brief are those of the individuals and not necessarily those of any institutions with which the individuals are or have been affiliated.

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SUMMARY OF THE ARGUMENT

Petitioner William Bracy has made a substantial showing that judicial corruption may have tainted the conviction and death

sentence imposed upon him following jury proceedings presided over by Thomas J. Maloney, who has since been convicted of federal racketeering charges. There is "good cause" -- and public necessity -- for discovery to assess whether Maloney's corruption infected Bracy's trial and sentencing.

Bracy demonstrates persuasively that Maloney was prejudiced against defendants who did not pay him money. Maloney had strong incentives to facilitate convictions of non-paying defendants in order: (1) to divert suspicion that might otherwise be aroused by acquittals Maloney was paid to render in other cases; (2) to increase the incentive for defendants to pay money in cases assigned to him; and (3) to cultivate a "law and order" image and thereby ensure his electability.

Because of the substantial risk that prejudice infected Bracy's trial, it is imperative that Bracy have the opportunity to pursue discovery -- if for no other reason than to lay to rest the gravely unsettling possibility that Bracy's trial and capital sentence were tainted by judicial corruption. Rule 6 of the Federal Rules governing § 2254 cases, allows discovery where there is "good cause." No right is more essential to the notion of a fair trial and due process than the right to have a trial before an unbiased, impartial judge. Bracy has made an ample showing that Maloney likely did not fulfill that function in his case. With a fully developed record, there is reason to believe that Maloney's prejudice and the violation of Bracy's due process rights will be apparent. Thus, the opportunity for discovery is mandated.

There must be zero tolerance for the venality that Maloney practiced in his years on the bench. The Court should not hesitate to authorize a full development of the facts as to

whether and how Maloney's corruption infected Bracy's trial. Anything less would reflect an unacceptable indifference to Maloney's radical and absolute departure from every principle for which our judicial system stands. Anything less would exacerbate the erosion of public confidence in the Illinois court system that Maloney's corruption has already produced.

ARGUMENT

I. THERE IS NEED FOR AN INQUIRY INTO WHETHER THOMAS J. MALONEY'S CORRUPTION INFECTED BRACY'S TRIAL.

A. Corruption permeated Maloney's career, including the period of Bracy's trial.

William Bracy was convicted of murder and other crimes and was sentenced to death in 1981 following jury proceedings presided over by Thomas J. Maloney, a former judge of the Cook County, Illinois Circuit Court. Maloney, in turn, was convicted in 1993 of the federal crimes of racketeering, extortion under color of official right and obstruction of justice, for which he is now serving a prison term of nearly sixteen years.

By any measure, Maloney's misconduct was staggering. In 1981 -- the very year in which he presided over Bracy's trial -- Maloney was found by his federal jury to have received an undetermined portion of a $100,000.00 payment to acquit three New York gang members of murdering a rival in Chicago's Chinatown. See United States v. Maloney, 71 F.3d 645, 650 (7th Cir. 1995). The year following Bracy's conviction -- 1982 -- Maloney accepted between $4,000.00 and $5,000.00 to convict a defendant of voluntary manslaughter rather than felony

murder and, in a separate case, accepted approximately $3,000.00 to sentence a defendant to probation instead of a prison sentence. Id. at 650-51. Maloney was also convicted of accepting $10,000.00 to acquit two members of the El Rukn street gang charged with a double murder in 1985 and then giving the money back when he perceived (correctly) that the FBI was investigating him. Id. at 651.

These federal convictions only scratched the surface of Maloney's corruption. At Maloney's trial, government witnesses testified about other cases in which Maloney had taken money, but which were not charged in the federal indictment. See id. at 649-52. Based on evidence presented at sentencing, United States District Judge Harry D. Leinenweber found that as a lawyer, prior to his election to the bench, Maloney cooperated in procuring the acquittal of reputed mob hitman Harry Aleman by Judge Frank Wilson in 1977.[2] Another witness testified that Maloney helped him evade a series of criminal charges by bribing judges as early as the late 1960's. Thus, "by the time Maloney ascended to the bench in 1977, he was well groomed in the art of judicial corruption, an art that he practiced at least until 1986, when he correctly perceived that he was under the watchful eye of the FBI and returned the $10,000.00 bribe he had accepted in the El Rukn prosecution." Bracy v. Gramley, 81 F.3d 684, 696 (7th Cir. 1996) (Rovner, J., dissenting).

---

[2] The Illinois Appellate Court recently held that Aleman's putative "acquittal" was insufficient to trigger the protection of the Double Jeopardy Clause because Aleman, under the circumstances, had never actually been in jeopardy of conviction. See People v. Aleman, 281 Ill. App. 3d 991, 667 N.E. 2d 215 (1996), cert. denied, 1996 WL 745063 (February 18, 1997).

Maloney hid his shocking corruption under his judicial robes. However, at his federal trial he was exposed as a criminal who, a federal jury found, "transformed his very office into a racketeering enterprise." Id. at 699. Judge Rovner aptly characterized the dissonance between appearance and reality in Maloney's courtroom: "We may no more treat Maloney as an impartial arbiter for constitutional purposes than a delusional megalomaniac who locks a judge in the closet, dons a black robe, and hoodwinks everyone with a credible impersonation of Oliver Wendell Holmes." Id. at 700.

It is, as the majority below recognized, plausible to infer that Maloney's corruption "permeate[d] his judicial conduct" and was not "encapsulated in the particular cases in which he [took] bribes." See id. at 689. In fact, any other inference would ignore Maloney's fundamental departure from propriety and justice. "Once he embarked on the path of bribe taking, Maloney abandoned his judicial oath. Justice was a mere commodity to him, defendants nothing more than a profit center. His deviation from the path of righteousness was not . . .momentary and uncharacteristic; it was cold, calculated, and spanned a period of years, if not the entirety of his tenure on the bench." Id. at 699-700 (Rovner, J., dissenting).

B. There is direct evidence showing that Maloney was especially tough on defendants who did not pay money.

Bracy does not contend that Maloney sought to extort money from him in his case. However, Bracy demonstrates convincingly that Maloney was prejudiced against defendants in cases where money was not paid. This prejudice denied fair trials to defendants who did not pay Maloney money. First,

Maloney had to facilitate convictions of non-paying defendants in order to divert suspicion that might otherwise be aroused by the acquittals Maloney had been paid to render. Second, a harsh, pro-State bias, which Maloney often exhibited, would increase the incentive for defendants to pay money in cases assigned to Maloney's courtroom. And third, Maloney needed to present a "law and order" image to ensure his electability even while he broke the law with impunity.

There was evidence at Maloney's federal trial that demonstrates that Maloney's corruption may have affected numerous defendants. William Swano, a corrupt defense attorney who cooperated with the federal investigation of Maloney, testified that he paid money to Maloney on a number of occasions. He testified that in 1985 he represented James Davis, who was charged with armed robbery. Davis's case was assigned to Maloney. The evidence against Davis was weak: the three witnesses to the robbery knew the two perpetrators and said Davis was not one of them; the victim confessed uncertainty about the identity of the offender; and Davis himself had an alibi. Under the circumstances, Swano was confident that "[t]he case was a not guilty in any courtroom in the building." Swano tried the case to Maloney without a jury. Though Swano paid Maloney on prior occasions, Swano did not pay Maloney in this case. Davis was convicted. Swano testified that he took this result as a lesson that "to practice in front of Judge Maloney . . . we had to pay." Bracy v. Gramley, 81 F.3d at 697, citing United States v. Maloney, 1994 WL 96673, No. 91 CR 477, 3/24/93 Tr. at 2528, 2530.

Throughout his tenure on the bench, Maloney was widely feared among the defense bar as a severe, prosecution-minded judge -- a fact that rendered his 1991 indictment a stunning

surprise. That Maloney purposefully cultivated that image became clear at the sentencing hearing in his case, when, during a lengthy allocution, Maloney boasted about the number of defendants he had convicted -- going so far as to specifically mention Bracy's case. See United States v. Maloney, No. 91 CR 477, 7/21/94 Tr. at 607. Maloney's need to maintain appearances through a law and order veneer must have predisposed Maloney against non-paying defendants, particularly in high profile capital cases like Bracy's.

C. There is "good cause" for discovery in this case.

Before a habeas petitioner may engage in discovery, he must demonstrate "good cause." See Rule 6 of the Federal Rules Governing § 2254 cases. The commentary to Rule 6 provides: "Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and is therefore entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." The lower courts have uniformly held that denial of discovery is an abuse of discretion where the discovery is "indispensable to a fair, rounded development of material facts." East v. Scott, 55 F.3d 996, 1001 (5th Cir. 1996) (citations omitted). See also Toney v. Gammon, 79 F.3d 693, 700 (8th Cir. 1996) (citations omitted).

Bracy satisfies the requirements for discovery under Habeas Rule 6. First, there is no serious question that, if Maloney were found to have been prejudiced against Bracy, it would follow that Bracy is "confined illegally" and "entitled to relief." "Trial before 'an unbiased judge' is essential to due

process." Johnson v. Mississippi, 403 U.S. 212, 216 (1971), citing Bloom v. Illinois, 391 U.S. 194, 205 (1968); Mayberry v. Pennsylvania, 400 U.S. 455, 465 (1971).

"No right is more fundamental to the notion of a fair trial than the right to an impartial judge." Bracy v. Gramley, 81 F.3d at 696 (Rovner, J., dissenting) (citing Johnson, 403 U.S. at 216; In re Murchison, 349 U.S. 133, 136 (1955); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986); Ward v. Village of Monroeville, Ohio, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927)). As Judge Rovner stated in her dissent, our federal and state constitutions "promise a full panoply of rights to the accused. But ultimately the guarantee of these rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted." Bracy v. Gramley, 81 F.3d at 696.

Second, Bracy has made specific allegations from which there is reason to believe that, if the facts were fully developed, Maloney's bias -- and the violation of Bracy's due process rights -- would be apparent. It is clear that Maloney's corruption was probably not limited to the particular cases in which money was exchanged for an acquittal. The evidence against Maloney demonstrated that he was a criminally oriented person for whom the concept of justice was fundamentally irrelevant. Bracy has amply demonstrated that Maloney had every reason to be unnecessarily and dramatically harsh in cases like Bracy's in which he had not received money.

Maloney had numerous opportunities in the course of Bracy's case to influence the outcome of the proceedings. For example, in Bracy's trial Maloney denied a defense motion to suppress certain seized evidence, ruling that the state's witnesses were more credible than the defense witnesses regarding the

circumstances of the seizure. The Illinois Supreme Court, applying settled law, -- and writing in 1985 when Maloney's corruption was unknown to all but his cohorts and those investigating his crimes -- refused to second guess Maloney's credibility findings. See People v. Collins, 106 Ill. 2d 237, 264, 478 N.E.2d 267, 278-79 (1985).

Maloney's ability to influence the perceived credibility of witnesses in his courtroom was enormous. For example, Maloney allowed the state wide latitude in its cross examination of certain defense witnesses. Those rulings were not disturbed by the Illinois Supreme Court on appeal, because "[t]he latitude to be allowed on cross examination . . . is a matter within the sound discretion of the trial court . . ." Id. at 268-69, 478 N.E.2d at 280-81. In Bracy's case, these rulings were of enormous significance, because, as the Illinois Supreme Court noted, the jury's "resolution of the defendants' guilt or innocence depended on the credibility of the witnesses and the weight given to their testimony." Id. at 261, 478 N.E.2d at 277.

Maloney made a host of other discretionary rulings during Bracy's case, all of which, as Maloney surely would have known, were virtually immune from appellate review. For example, Maloney excused a potential juror for cause under Witherspoon v. Illinois, 391 U.S. 510 (1968), based upon the juror's wholly ambiguous response to a question regarding willingness to impose the death penalty. See id. at 279-80, 478 N.E.2d at 286. Maloney denied the defense a continuance between the guilt and the sentencing phases of Bracy's trial, rejecting the defense argument that it needed time to investigate other crimes evidence that the State intended to introduce in aggravation. See id. at 280, 478 N.E.2d at 286-87.

The fact that Maloney appeared not to have abused his discretion with respect to any of these rulings scarcely proves lack of prejudice. To the contrary, as Judge Rovner pointed out in her dissent below: "A judge who wishes to be tough need not adopt the manner of the Tasmanian Devil to do it. Maloney was by no account stupid. When he sold an acquittal, he wanted facts he could hang his hat on . . . ; and we have no reason to doubt that if he wanted to cultivate a pro-prosecution record to protect his interests as a bribe taker, he had the ability to do so discretely, without appearing to have abused his discretion as a trial judge." Bracy v. Gramley, 81 F.3d at 698-99.

The discovery that Bracy sought in the District Court was limited and narrowly tailored to address the question of whether Maloney's pervasive and calculated corruption infected Bracy's proceedings. Bracy sought to subpoena investigative files in the possession of the United States Attorney and to depose witnesses, including Swano, familiar with Maloney's corrupt practices. That discovery could lead to other evidence confirming Swano's testimony about the fortunes of defendants who did not pay money in Maloney's courtroom. It could yield data that would indicate patterns of convictions and acquittals at the time of Bracy's trial and sentencing. The discovery might even reveal that there was additional, uncharged misconduct by Maloney closely connected in time to the Bracy proceedings.

Allowing Bracy his discovery is a small price to pay to achieve a critically important end. Only with a full and complete inquiry can we be certain that an Illinois death sentence will not be carried out against a person whose trial was fundamentally tainted and unfair.

II. THE COURT SHOULD GRANT RELIEF IN THIS CASE IN ORDER TO PROTECT THE INTEGRITY OF THE ILLINOIS CRIMINAL JUSTICE SYSTEM.

The issue presented by the Court's grant of certiorari in this case is a matter of particular concern to those of us who practice law in the State of Illinois and to the citizens of our State. We have the unfortunate distinction to be the only United States jurisdiction in which a judge has been convicted of taking money for acquittals in capital murder cases. See "Month by Month: The Year That Was," National Law Journal, p. C2 (December 26, 1994).

Maloney's conduct, undoubtedly singular in callous disregard for the victims of crimes, for the families of victims and the very concept of justice, was nonetheless, it is well known, not the only instance of judicial corruption in Cook County, Illinois. Within the last decade, a total of 18 Cook County Circuit Judges have been convicted of crimes connected to the performance of their duties. See William Grady, "50 picked to study state court reform," Chicago Tribune, Chicagoland p.3 (January 9, 1992); see also "Chicago's Hall of Infamy," Chicago Sun-Times News p. 6 (April 29, 1994) (listing aldermen and judges convicted on corruption charges since 1979).

Maloney's indictment and subsequent conviction had a particularly negative impact on the public confidence in the Illinois justice system. As Judge Leinenweber said at Maloney's sentencing hearing, Maloney's unconscionable conduct has caused damage to the public "like dropping a bomb in the ocean" because of all the "ripples." Judge Leinenweber called Maloney's release of murderers "atrocious." In addition,

commenting on the "damage to the system," Judge Leinenweber added, "To know that dangerous criminals have been given a pass, certainly, doesn't help the public in its view of the crime problem." United States v. Maloney, No. 91 CR 477, July 21, 1994 Tr. at 631.

Moreover, Maloney's corruption persisted even after the announcement of the indictment of other members of the Illinois judiciary as a result of the federal Operation Greylord investigation. Thus, Maloney displayed a particular disrespect for the system and an "unbridled arrogance." See John Flynn Rooney, "Conviction of former judge Maloney sets a new low-water mark in court corruption," Chicago Daily Law Bulletin, p. 1 (April 19, 1993).

In recent years, the public has lost a substantial degree of its confidence in the Illinois court system. Public dismay at the condition of justice in Illinois has found ample expression in the Illinois media. See, e.g., Andrew Grene, "Courts, legal community faulted for shortcomings in '93," Chicago Daily Law Bulletin, p. 1 (January 3, 1994) ("Over the past 12 months, the justice system itself often seemed to be on trial in Illinois."); Tom McNamee, "Cost of a Wall: What else could $150,000 buy? Ask around." Chicago Sun-Times, News p. 4 (June 6, 1993) ("For $150,000, some cynics suggest, Chicagoans in the know could fix about 3,000 traffic tickets, bribe 1,500 building inspectors -- or fix 30 murder trials -- at $5,000 a crack."); Rosalind Rossi, "Maloney Jurors say Verdict is Message," Chicago Sun-Times, p. 4 (April 18, 1993) ("We all agreed that this is the message we wanted to send: 'We want honest people in office' said juror Marion Morel. . . .These offices are too high to have crooks in them.").

Much has been done to combat this erosion of public confidence. The indictment and conviction of Maloney and others prompted reform efforts, including the creation of a Special Commission of the Illinois Supreme Court to study ways in which judicial reform should occur. See John Flynn Rooney, "Courts Panel Plans to Form Task Forces," Chicago Daily Law Bulletin, p. 1 (January 9, 1992); William Grady, "50 picked to study state court reform," Chicago Tribune, Chicagoland p. 3 (January 9, 1992).

In addition, the daily work of the vast majority of the members of the Illinois judiciary, who are diligent, capable and honest, goes a long way toward restoring confidence among the public in the decency and integrity of the Illinois judiciary.

Nevertheless, the only sure way to restore faith in the integrity of our judiciary is to adhere steadfastly to a position of zero tolerance for judicial corruption. Bracy has raised a substantial claim that his conviction and death sentence were infected by Maloney's corruption and bias. Failure to permit discovery into the impact on Bracy of Maloney's misconduct would constitute an unacceptable tolerance for corruption. In this matter, the Court must eschew indifference. Not only Bracy, but the citizens of Illinois have the right to an inquiry into whether and how Maloney's criminality tainted this trial and death sentence.

Judge Rovner's dissent captured why discovery is vital in this case: "We would like to think that rampant corruption on the Cook County bench is a relic of the past. But it will not be, it cannot be, so long as we refuse to recognize just how fundamentally at odds this corruption is with the constitutional guarantee of due process. Like Terrence Hake, who risked his

own career to expose the criminals clothed in the robes of judges, we too have a role to play in restoring integrity to the bench. We cannot embrace the judicial services of outlaws without deepening the stain their crimes have already left on our courts." Bracy, 81 F.3d at 704 (Rovner, J. dissenting).

Bracy should be permitted to pursue discovery to determine whether Maloney's criminality tainted his conviction and sentence of death.

III. RELIEF IN THIS CASE IS ESSENTIAL TO THE INTEGRITY OF THE CAPITAL SENTENCING PROCESS AND WOULD NOT IMPOSE A SIGNIFICANT BURDEN ON THE STATE.

At stake in Bracy's case is integrity -- and the perception of integrity -- in the capital sentencing process. Where the ultimate, irreversible penalty is to be imposed, it is simply unacceptable to fail to investigate by any and all appropriate means whether contemporaneous judicial criminality tainted the proceedings. The penalty of death is "qualitatively different" from any other penalty. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Because of this fact, special care must be taken to ensure that the sentence of death was, and appears to the pubic to have been, imposed by a fair and impartial tribunal. Authorizing Bracy's discovery is essential to this objective.

The cost of allowing Bracy's discovery is minimal. Maloney is the only judge in the United States ever to have been convicted of corruption at the same time he presided over capital cases. There is only a handful of capital sentences imposed in Maloney's courtroom that are now under review in the Illinois state and federal courts. Accordingly, no significant burden

would be imposed on the State if discovery were allowed in these exceptional circumstances.

We in Illinois are particularly sensitive to the importance of a capital sentencing process that is and appears to be fair and reliable. We have witnessed the release of seven Death Row inmates in the last nine years on the ground of actual innocence of the crimes for which they were sentenced to death. See Ken Armstrong, "Bars to Justice: In A System Ravenous For Convictions Sometimes The Innocent Don't Walk," Chicago Tribune, Perspective, p. 1 (June 23, 1996). Just as it is intolerable to execute an innocent person, it is intolerable that a person wrongfully convicted because of Maloney's abhorrent behavior could be sent to his death. The minimum safeguard of allowing discovery into the facts is essential.

CONCLUSION

For the reasons set forth in this brief, the Concerned Illinois Lawyers and Law Professors request the Court to reverse the decision of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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Jim Ryan
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February 19, 1997

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Re: Bracy v. Gramley
96-6133

Dear Mr. Geraghty:

This is to confirm that I consent to the filing of an amicus curiae brief by the Concerned Illinois Lawyers and Law Professors on behalf of petitioner in the above-entitled matter.

Sincerely,

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Re: Bracy v. Gramley
U.S. Supreme Court Number 96-6133

Dear Mr. Geraghty:

This is to confirm that I consent to the filing of the amicus curiae brief by you and the other amici on behalf of my client, William Bracy.

Sincerely,

Gilbert H. Levy

GHL:mf
c: William Bracy

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(9)

No. 96-6133

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

WILLIAM BRACY, *Petitioner*,

v.

RICHARD GRAMLEY, Warden, Pontiac Correctional Center,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH
CIRCUIT

BRIEF *AMICUS CURIAE* OF THE STATES OF CALIFORNIA, ALABAMA, ARIZONA, DELAWARE, NEVADA, NEW YORK, OKLAHOMA AND VIRGINIA IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a habeas petitioner who was convicted of a capital offense and sentenced to death before a trial judge who admittedly accepted bribes in other contemporaneous criminal cases is entitled to discovery to support his claim that he was denied the right to a trial before a fair and impartial judge.

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INTEREST OF AMICI CURIAE

This case presents significant questions regarding the scope of permissible discovery in federal habeas corpus cases brought by state prisoners. Since the States bear most of the costs of federal habeas review, the amici have an interest in minimizing these costs by insuring that discovery is limited to claims that are properly before a federal court. Amici also have an interest in preserving the finality of state court criminal judgments from remote attacks unrelated to a petitioner's guilt of the underlying crime. The Antiterrorism and Effective Death Penalty Act of 1996 limits the availability of evidentiary hearings in federal habeas, and would prohibit a hearing in the present case.

This brief is submitted by amici through their respective Attorneys General in accordance with Rule 37.5 of the Rules of the Supreme Court.

SUMMARY OF ARGUMENT

A habeas petitioner's entitlement to discovery must be considered in light of the standards announced in the Antiterrorism and Effective Death Penalty Act of 1996. The Act applies to pending cases, including this case. The Act's new amendment of 28 U.S.C section 2254(e) prohibits a federal evidentiary hearing on claims that a petitioner failed to develop in state court. Petitioner in this case did not develop the factual basis of his claim in state court. Nor can he make out an exception under the statutory criteria since he cannot demonstrate, and indeed does not claim, factual innocence of the underlying crime. Since petitioner would not be entitled to an evidentiary hearing under the Act, he is not entitled to discovery regarding the claim.

ARGUMENT

THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 APPLIES TO THIS CASE AND PROHIBITS PETITIONER'S PROPOSED DISCOVERY BECAUSE PETITIONER CANNOT SATISFY THE ACT'S REQUIREMENTS FOR AN EVIDENTIARY HEARING

A. Introduction

On April 12, 1996, the court of appeals affirmed the judgment of the district court dismissing the petition for a writ of habeas corpus in this case. *Bracy v. Gramley,* 81 F. 3d 684 (7th Cir. 1996). Ten days later the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, which contains provisions curtailing the scope and availability of federal habeas corpus for state prisoners, including condemned prisoners, and in particular limits the circumstances in which habeas petitioners are entitled to evidentiary hearings in federal court. Amici submit that the Act's repeal of discretionary evidentiary hearings applies to this case. As we will show, since petitioner cannot satisfy the Act's requirements for an evidentiary hearing, he is not entitled to discovery on his underlying claim of judicial bias.

B. The Issue Addressed By Amici Is Necessarily Presented In This Case In Light Of The Grant Of Certiorari In *Lindh v. Murphy*

New section 2254(e) of Title 28 of the United States Code now prohibits evidentiary hearings in federal habeas cases where the petitioner has failed to develop the factual basis for a claim in state court. This prohibition was not addressed by the court of appeals or the parties because this case was briefed and decided prior to enactment of the Act. Since then, however, the Act has been signed into law and this Court has granted certiorari in *Lindh v. Murphy,* No. 96-6298, to decide the extent to which the habeas corpus provisions of the Act apply to pending cases. 117 S. Ct. 726 (1997). The question presented in this case, regarding the extent to which a habeas petitioner is entitled to discovery, necessarily depends on the circumstances in which a petitioner is entitled to an evidentiary hearing. Given that the Act alters the standards for granting an evidentiary hearing, the effect of the evidentiary hearing provisions of the Act is a subsidiary question fairly included in the question presented. *See Mackey v. United States,* 401 U.S. 667, 684 (1969) (opinion of Harlan, J.); *Caspari v. Bohlen,* 114 S. Ct 948, 953 (1994); *Teague v. Lane,* 489 U.S. 288, 300 (1989).

C. The Antiterrorism And Effective Death Penalty Act's Repeal Of Discretionary Evidentiary Hearings Applies To This Case

New section 2254(e) provides in relevant part:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --

> (A) The claim relies on --
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
> (B) The facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Because the Act does not explicitly state when the amendment concerning entitlement to an evidentiary hearing takes effect, it becomes operative on the date of enactment unless its operation would be "retroactive" in the sense of attaching new legal consequences to events completed before its enactment. *Landgraf v. USI Film Products,* 511 U.S. 244, 254, n. 23 (1994). "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Id.* at 269. A court considers, for example, whether the statute deals primarily with the court's jurisdiction, procedures, or power to grant prospective relief; or whether, instead, it "impair[s] rights a party possessed when he acted, increase[s] a party's liability for past conduct, or impose[s] new duties with respect to transactions already completed." *Id.* at 261. In the former situation, a court should "apply the law in effect at the time it renders a decision" -- that is, apply the intervening new statute immediately to the case at bar." *Id.* at 242. In the latter case, typically arising in the areas of "contractual or property rights" where actors rely on the predictability and stability of the law at the time of the

transaction, a court presumes that the new law does not apply "retroactively" to alter the effect of the prior primary conduct of individuals in a new way. *Id.* at 256.

The limitation on evidentiary hearings is, manifestly, a rule governing a federal court's procedures and power to grant prospective relief. As such, it "speak[s] to the power of the court rather than to the rights or obligations of the parties," and regulates "secondary" rather than "primary" conduct, so that its immediate application to a pending case would not truly be "retroactive." *Landgraf,* at 257 ("When the intervening statute authorizes or affects the propriety of prospective relief, application of the new provision is not retroactive.") It does not affect any "right" petitioner possessed when he "acted," increase his liability for past conduct, or impose any new duties with respect to completed transactions. *Id.* The reform does not increase petitioner's liability for prior conduct. It does not defeat any of his legitimate reliance interests. It does not impose upon him new duties with respect to transactions already completed. It does not divest him of a "vested right." It does not even purport to govern petitioner's "primary" conduct. The evidentiary hearing restriction, instead, is a rule governing court procedures. In light of the foregoing criteria, the reform prohibiting discretionary evidentiary hearings in cases where the petitioner has failed to develop the factual basis of claims in state court would apply to the case at bar. It should therefore apply immediately to a pending case such as this one.

Even if new section 2254(e)(2) were deemed genuinely "retroactive" in the *Landgraf* sense, the normal "default" rule against retroactive application should not be invoked in the special context of remedial habeas corpus legislation. The essential nature of federal habeas corpus is that of a "secondary and limited" collateral attack on the fully-litigated state trial that serves as the true "main event" in the criminal process. *Barefoot v. Estelle,* 463

U.S. 880, 887 (1983). Because of the removed and "extraordinary" nature of the collateral habeas process, the background federal habeas policies of comity and finality with respect to state criminal convictions provide a unique setting in which the legitimate reliance interests that ordinarily would inform the court's application of *Landgraf* lie peculiarly with the State and not with the habeas petitioner. *See Lockhart v. Fretwell,* 506 U.S. 364 (1993) (the State, but not the petitioner, may rely on intervening change of law in federal habeas proceedings); *McCleskey v. Zant,* 499 U.S. 467 (1991) (new stricter rules on abuse-of-writ doctrine announced and applied to defeat habeas petition); *Coleman v. Thompson,* 501 U.S. 722 (1991); *Brecht v. Abrahamson,* 507 U.S. 619 (1993) (relaxed harmless-error rule announced and applied to defeat habeas petition); *Teague v. Lane,* 489 U.S. 288 (1989) (habeas court may not announce or apply intervening new rules for petitioner's benefit).

D. A Habeas Petitioner Is Not Entitled To Discovery To Support A Factual Claim That Cannot Be Addressed At An Evidentiary Hearing

This case presents the question of whether petitioner is entitled to discovery to support his claim that he was denied the right to a trial before an impartial judge since the judge had accepted bribes in unrelated cases. The factual predicates of that claim were never developed in state court proceedings. The forum to develop and prove the predicate facts would therefore necessarily be an evidentiary hearing in the federal court. After all, discovery is only allowed in the habeas context "when the court considers that it is necessary . . . in order that a fair and meaningful hearing may be held . . ."

Harris v. Nelson, 394 U.S. 286, 300 (1969).[1] In view of the Act's standards for allowing an evidentiary hearing, however, petitioner's claim could not be the subject of a hearing.

Again, the Act provides:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that --
>
> (A) The claim relies on --
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Petitioner failed to develop the factual basis of his judicial corruption claim in state court proceedings. Petitioner might argue that fault is required before a petitioner's failure constitutes a bar; and that, since he raised the claim as soon as he could discover it, but after the time had passed for the state supreme court to hear claims arising out of his trial, he did not "fail to develop" the claim in state court.

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1. To the extent the comments of the Advisory Committee accompanying Rule 6 of the Rules Governing Section 2254 Cases in the District Courts suggest a broader right, those comments misread *Harris v. Nelson* and would be obsolete in light of the Act.

However, when the statute's reference to a "failure to develop" ((e)(2)) on the part of a petitioner is read in connection with the "could not have been previously discovered" language ((e)(2)(A)(ii)), it becomes clear that the entire subsection encompasses all non-development of factual claims, regardless of cause or fault. It would be redundant for a petitioner to demonstrate that the facts sought to be introduced at an evidentiary hearing could not have been acquired previously through exercise of due diligence if the section applied only to those situations where a petitioner was "at fault" for having "failed to develop" them in the first place. Thus, *any* non-development of the facts underlying a claim must be subjected to the criteria of subdivisions (A) and (B).

Nor does petitioner's claim rely on any retroactive rule previously announced by this Court. The court of appeals properly recognized the novelty of the claim when it invoked *Teague v. Lane*. Consequently, subdivision (2)(A)(i) is inapplicable. Petitioner must therefore satisfy subdivision (2)(A)(ii) and (B) en route to gaining an evidentiary hearing.

Even where a petitioner seeks application of law that has been expressly made retroactive in application or has demonstrated good cause for belated development of facts, that petitioner must satisfy subsection (B) of the Act before federal development of the underlying facts is permitted.

The claim of generalized bias in this case could not satisfy subsection (B). Stated another way, even the most liberal interpretation of petitioner's claim would amount to much less than the required "clear and convincing evidence" that, but for the alleged error, no reasonable factfinder would have found petitioner guilty of capital murder.

As the court of appeals observed in this case, a claim of generalized judicial bias relies far more on speculation than empirical evidence. 81 F. 3d at 690.

After all, the discretionary rulings that petitioner might wish to attribute to bias were independently reviewable on appeal. "To show this (bias in the judge's rulings) would not have required an . . . investigation, but merely a review of the transcript of the trial . . . . The Supreme Court of Illinois did not find any errors in the rulings." *Id.* The district court in this case similarly concluded that petitioner's theory of bias "is only a matter of speculation." 868 F. Supp. at 991.

Since there is no claim of a bribe in this case, the grant of discovery under these circumstances would only mean that miscellaneous details of the judge's corruption in unrelated cases could be presented to the district court as a precursor to the petitioner's request that the court speculate that bias somehow infected this case even though -- as already noted -- petitioner could not demonstrate error per se in the trial judge's discretionary rulings.

It is not surprising, in light of the lack of evidence of prejudice and the lack of the potential for such evidence, that petitioner stresses that a showing of judicial corruption in the underlying case (unlike here, where the bribes were taken in unrelated cases) requires only a *de minimis* showing to justify relief, and does not involve consideration of the strength of the evidence against the petitioner. *See* Pet'r Br. at 13, at 14 (referring to "strict rule" invalidating any case of possible corruption), at 15 ("possible temptation . . . is sufficient to establish a due process violation"), at 16 (bribes in unrelated cases is "sufficiently suggestive" of a "possible" due process violation).

Petitioner's theory, accurately described as "only a matter of speculation," 868 F. Supp at 991, cannot be reconciled with the Act's explicit requirement of clear and convincing evidence of innocence. This Court has held, in the specific context of procedural default in a habeas case, that the "not guilty of the underlying offense" rule requires

that a petitioner demonstrate actual innocence. *Schlup v. Delo,* 115 S. Ct. 851, 867 (1995); *Sawyer v. Whitley,* 503 U.S. 333, 348 (1992). In other words, petitioner must show by clear and convincing evidence that absent the presence of this judge no reasonable juror would have found him guilty, as he was not guilty.

Petitioner does not even attempt to meet that standard. The evidence of petitioner's guilt is, according to the court of appeals, "compelling." 81 F. 3d at 687. In confirming the sufficiency of that evidence, the district court observed that the jury's verdict "is amply supported by the evidence." 868 F. Supp. at 978. Thus, both federal courts that have reviewed the evidence against petitioner have recognized the strength of the evidence. In the face of that evidence, petitioner could not obtain an evidentiary hearing (even if he had satisfied the Act's preceding provisions) since as a matter of law he cannot demonstrate "actual innocence." Since petitioner is not entitled to an evidentiary hearing, he is necessarily not entitled to discovery. *See Harris v. Nelson,* 394 U.S. at 300.

CONCLUSION

For the foregoing reasons, amici respectfully ask that the decision of the court below be affirmed.

Dated: March 20, 1997.

Respectfully submitted,

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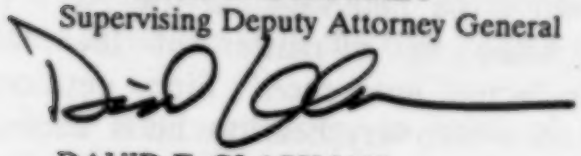

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